

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

APRIL TERM, 1933

No. 6051

435

SPECIAL CALENDAR.

THE UNITED STATES OF AMERICA EX RELATIONE
ALONZO PERRY, A MINOR, BY HIS LEGAL
GUARDIAN, G. W. BUSBY, APPELLANT,

vs.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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APPELLEE.

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COLUMBIA.

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Court of Appeals of the District of Columbia

No. 6051.

U. S. ex Rel. ALONZO PERRY, a Minor, by His Legal
Guardian, G. W. BUSBY, Appellant,

vs.

HAROLD L. ICKES, Secretary of the Interior.

1 Supreme Court of the District of Columbia.

At Law.

No. 81355.

THE UNITED STATES OF AMERICA ex Relatione ALONZO
PERRY, a Minor, by His Legal Guardian, G. W.
Busby, Plaintiff,

vs.

RAY LYMAN WILBUR, Secretary of the Interior, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition for Writ of Mandamus.

Filed June 3, 1932.

In the Supreme Court of the District of Columbia, Holding
a Law Court.

At Law.

No. 81355.

THE UNITED STATES OF AMERICA ex Relatione ALONZO
PERRY, a Minor, by His Legal Guardian, G. W.
Busby, Plaintiff,

vs.

RAY LYMAN WILBUR, Secretary of the Interior, Defendant.

Comes now the petitioner, Alonzo Perry, by his legal guardian, G. W. Busby, and respectfully represents to the court:

1. That the plaintiff Alonzo Perry is a minor resident in the county of Pontotoc, State of Oklahoma, and has as his duly legally appointed, qualified, and acting guardian G. W. Busby, a resident of Pontotoc County, Oklahoma, and this suit is brought in plaintiff's own right and by authority conferred by the County Court of Pontotoc County, Oklahoma, which by the statutes in such case made and provided has jurisdiction over the person and estate of said Alonzo Perry.

2. The defendant Ray Lyman Wilbur is a citizen of the United States temporarily resident in the District of Columbia as Secretary of the Interior and is sued as such and in his own right as unlawfully and contrary to law undertaking through his subordinates to usurp possession and control over the funds and property of plaintiff Alonzo Perry.

3. That Alice Perry nee Harjo, the mother of petitioner Alonzo Perry, departed this life in Pontotoc County, Oklahoma, on, to wit, June 22, 1923, leaving as her heirs at law and next of kin her husband Edward Perry and two children by a former marriage, Lucille Perry and petitioner Alonzo Perry, both minors and seized and possessed of a tract of land set apart as her homestead under the statutes in such case made and provided desig-

nated and described as follows, to wit: Lots eight (8) and nine (9) of section nineteen (19) and the NW/4 of section twenty (20), township five (5) north, range eight (8) east, containing 215.6 acres. A true copy of the homestead patent issued to said Alice Perry for the lands described is attached hereto marked "Plaintiff's Exhibit A" and is prayed to be read as a part hereof as though incorporated herein.

4. Alice Perry née Harjo aforesaid was duly enrolled on the approved rolls of the Chickasaw Tribe as an Indian of one-half blood and by the statutes in such case made and provided the rolls were and are conclusive evidence of her quantum of Indian blood and her allotment and designation as a homestead of the above-described lands had been made pursuant to section 12 of the aforesaid act approved July 1, 1902, which provided that the lands designated as a homestead "shall be inalienable during the lifetime of the allottee" and it was further provided by said act aforesaid, approved July 1, 1902, section 15, that "Lands allotted to members and freedmen shall not be encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided."

Petitioner states that under the provisions of said act and the laws of the United States in such case made and provided the lands herein described as the homestead of Alice Perry née Harjo, deceased, and the proceeds thereof were not subject to the debts of Alice Perry aforesaid or of her estate and were not subject to administration, but said homestead and its proceeds amounting now to approximately sixty thousand dollars as the share of Alonzo Perry, a minor, descended and passed over to him and became and now is his, free from any claims or demands against the estate of said Alice Perry, his mother, or of petitioner Alonzo Perry.

5. Plaintiff states that in and by the act of Congress approved May 27, 1908, entitled "An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes and for other purposes" (35 Stat. 312), it was provided by section 1 that "All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-

bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe," and by section 9 thereof it was provided as follows: "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of

3 said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one."

6. Subsequent to the death of Alice Perry, nee Harjo, aforesaid, a proceeding to determine the heirs entitled to the homestead hereinbefore described was instituted in the District Court of Pontotoc County, Oklahoma, being the court invested with jurisdiction in such matters, and in said cause a final decree was rendered on the 28th day of May, 1931, whereby it was adjudged and decreed that the husband of said Alice Perry, Edward Perry, was the owner of a one-third interest in the homestead aforesaid and its proceeds, that her daughter Lucille Perry was the owner of a one-third interest, and that the plaintiff herein, her son, was the owner of a one-third interest in and to said homestead and by operation of law to the proceeds thereof. A true copy of said decree is attached hereto and prayed to be read as part hereof as though incorporated herein, marked "Plaintiff's Exhibit B".

7. Plaintiff further avers that the lands hereinbefore described as the homestead of Alice Perry, nee Harjo, deceased, were oil bearing and that there has accumulated and

now is in the custody and under the control of the defendant Ray Lyman Wilbur, who claims to hold said lands and proceeds by virtue of his office as Secretary of the Interior, the sum of sixty thousand dollars, more or less, to which Alonzo Perry, a minor, is entitled to be held for him and on his behalf subject to such orders and direction as the court may give to the legal guardian of said Alonzo Perry, G. W. Busby aforesaid, the said proceeds constituting a balance on hand as the part of the proceeds derived from oil and gas royalties on said homestead allotment hereinbefore described to which Alonzo Perry is entitled. The said Alonzo Perry is a child born since March 4, 1906, to the decedent, Alice Perry, nee Harjo, and as such his right to the sum of sixty thousand dollars, or thereabouts, the amount varying from time to time, now held or claimed to be held by the defendant, Ray Lyman Wilbur, is not subject to the supervision, control, or administration of the defendant, Ray Lyman Wilbur, the Secretary of the Interior, or the subordinates of said defendant but is a fund and constitute moneys that should be delivered and turned over to G. W. Busby, the legal guardian of the plaintiff, as by the law in such cases made and provided.

8. Plaintiff avers that the said defendant, Ray Lyman Wilbur, as Secretary of the Interior, and his subordinates asserting and claiming, though without lawful right thereto, the power to withhold the said funds from the legal guardian of Alonzo Perry, a petition was filed in the County Court of Pontotoc County, Oklahoma, being the court invested by law with jurisdiction in such matters, for
4 approval of a contract authorizing the employment of attorneys by G. W. Busby as legal guardian of said Alonzo Perry, minor, to institute such proceedings as might be necessary to obtain the release of the funds and property, including his interest in the homestead aforesaid, belonging to Alonzo Perry, minor, from the Secretary of the Interior, and on the third day of February, 1932, an order was duly passed by the county judge of Pontotoc County, Oklahoma, approving employment of attorneys for said G. W. Busby as guardian of Alonzo Perry, minor. A true copy of the contract of employment, application for approval of the same and the order of the court approving same is attached hereto marked "Plaintiff's Exhibit C" and is prayed to be read as a part hereof as though incorporated herein.

9. Thereafter demand was duly made upon the defendant Ray Lyman Wilbur on the 7th day of May, 1932, by counsel in Washington duly authorized to make said demand, that the defendant should deliver to G. W. Busby, guardian of Alonzo Perry, a minor, the funds and property in the custody or under the control of the defendant Ray Lyman Wilbur and his subordinates within fifteen days from date. A true copy of said demand is attached hereto marked "Plaintiff's Exhibit D" and is prayed to be read as part hereof as though incorporated herein.

Plaintiff states that the defendant Ray Lyman Wilbur has neglected and refused to comply with this demand. A true copy of his refusal is attached hereto marked "Plaintiff's Exhibit E" and is prayed to be read as part hereof as though incorporated herein.

10. Plaintiff states that the defendant Ray Lyman Wilbur is without authority of law and without legal right to withhold distribution to G. W. Busby as legal guardian of Alonzo Perry, minor, of the funds and moneys and property herein referred to but nevertheless arbitrarily and capriciously and without authority of law refuses to pay the same over and asserts an alleged right of supervision and control of the said funds, moneys, and property. Plaintiff further states that for two years last past the defendant Ray Lyman Wilbur has endeavored to obtain from Congress legislation permitting the Secretary of the Interior to continue control over the said funds, moneys, and property of said Alonzo Perry, minor, and of other persons in his same situation and legal status, but the Congress of the United States has neglected and refused to enact such legislation, and meanwhile the defendant Ray Lyman Wilbur, as Secretary of the Interior, is continuing to assert his illegal authority regardless of the fact that he has no legal authority therefor.

Wherefore, inasmuch as the defendant Ray Lyman Wilbur, Secretary of the Interior, has refused to pay to G. W. Busby as legal guardian of Alonzo Perry, minor, the funds in his custody or possession or control or in the possession, custody, or control of his subordinates and to turn same over to G. W. Busby, legal guardian of Alonzo Perry, minor, the party in law entitled thereto, and inasmuch as plaintiff has no other adequate or complete remedy, save by the process of this court, your plaintiff and petitioner prays:

First. That summons may be issued out of this court directed to Ray Lyman Wilbur, Secretary of the Interior, commanding him to answer this petition.

5 Second. That a rule may issue commanding the defendant to show cause, if any he has, why he should not state the amount which he has in his custody, possession, or control or in the possession, custody, or control of his subordinates of funds belonging to Alonzo Perry, minor, and his legal guardian, G. W. Busby, and why a writ of mandamus should not be issued against him.

Third. That a writ of mandamus may be issued commanding Ray Lyman Wilbur, Secretary of the Interior, to turn over to G. W. Busby, legal guardian of Alonzo Perry, minor, all the moneys, funds, and property belonging to Alonzo Perry, minor, and now held or claimed to be held by the defendant Ray Lyman Wilbur, Secretary of the Interior, and his subordinates.

Fourth. For such other and further relief as to the court may seem meet and proper and the nature of the case may require.

And as in duty bound your plaintiff and petitioner will ever pray.

ALONZO PERRY, MINOR,
By G. W. BUSBY,
Legal Guardian.

CHAS. H. MERILLAT,
Counsel for Plaintiff.

HARRELL & KERR,
By L. H. HARRELL.
HATCHER & KICE,
By BEN HATCHER.
BOND, HATCHER & BOND,
By REFORD BOND.

COUNTY OF PONTOTOC,
State of Oklahoma, ss:

G. W. Busby, being first duly sworn, deposes and says that he has read the foregoing mandamus petition by him subscribed as legal guardian of Alonzo Perry, a minor, and that the matters and things therein contained and stated he verily believes to be true.

G. W. BUSBY.

Subscribed and sworn to before me this 27 day of May, 1932.

[NOTARIAL SEAL.]

JESSYE E. ARNETT,
Notary Public.

My commission expires Sept. 11. 1935.

PLAINTIFF'S EXHIBIT A.

The Choctaw and Chickasaw Nations, Indian Territory.

No. 5798.

Chickasaw by Blood Roll, No. 572.

Date of Certificate, September 4, 1903.

To all to whom these presents shall come, Greeting:

Whereas, by the act of Congress approved July 1, 1902 (32 Stat. 641) and ratified by the citizens of the
6 Choctaw and Chickasaw Nations September 25, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes to each citizen of the Choctaw and Chickasaw Nations, land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations; and

Whereas, it was provided by said act of Congress that each member of said tribes shall, at the time of the selection of his allotment, designate, or have selected and designated for him, from his allotment, land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue; and,

Whereas the said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Alice Harjo, a citizen of the Chickasaw Nation as a homestead;

Now, therefore, we, the undersigned, the principal chief of the Choctaw National and the governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the twenty-ninth section of the act of Congress of the United States, approved June 28, 1898 (30 Stat. 495), have granted and conveyed, and by these presents do grant and convey unto the said Alice Harjo all right, title, and interest

of the Choctaw and Chickasaw Nations and of all other citizens of said nations, in and to the following described land, viz:

Lots eight (8) and nine (9) of section nineteen (19) and the northwest quarter of section twenty (20) township five (5) north and range eight (8) east (Chickasaw Nation) of the Indian base meridian, in Indian Territory, containing two hundred and fifteen and 60/100 (215.60) acres more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by the act of Congress approved July 1, 1902 (32 Stat. 641), pertaining to allotted homesteads.

In witness whereof, we, the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective nations to be affixed at the dates hereinafter shown.

Date Nov. 28, 1905.

[The Great Seal of the Choctaw Nation]

GREEN McCURTAIN,
Principal Chief of the Choctaw Nation.

Date December 12, 1905.

[The Great Seal of the Chickasaw Nation.]

DOUGLAS H. JOHNSON,
Governor of the Chickasaw Nation.

Department of the Interior,
LRS. Approved Jan. 29, 1906.

ETHAN A. HITCHCOCK,
Secretary,
By OLIVER A. PHELPS,
Clerk.

Filed for record on the 3 day of Feb., 1906, at 2 o'clock p. m.

_____,
County Clerk.

PLAINTIFF'S EXHIBIT B.

In the District Court of Pontotoc County, Oklahoma.

No. 10894.

SIMON (BUD) PERRY AND CICON PERRY now NELSON,
Plaintiffs,

vs.

LUCILLE PERRY AND ALONZO PERRY, G. W. BUSBY, Guardian of Lucille Perry and Alonzo Perry, Minors, and the Heirs, Unknown Heirs, Executors, Administrators, Devisees, Trustees, and Assigns, Immediate and Remote, of Alice Harjo, Deceased, and the Heirs, Unknown Heirs, Executors, Administrators, Devisees, Trustees, and Assigns, Immediate and Remote, of Edward Perry, Deceased, Defendants.

Journal Entry.

Now on this the 28th day of May, 1931, the same being one of the regular days of the April, 1931, term of this court, this cause having been duly and regularly assigned for trial, comes on in its regular order to be heard before Hal Johnson, assigned judge, he being assigned to hold court by the Supreme Court of Oklahoma, and the plaintiffs, Simon Perry and Cicon Perry now Nelson, adults, each appearing in person and by their attorneys, Brunson, Kemp & Ahrens; and the defendants, Lucille Perry and Alonzo Perry, appearing in person before the court and by L. H. Harrell, their duly and legally appointed guardian ad litem and G. W. Busby, their duly and legally appointed, qualified, and acting guardian; and by their attorney, L. H. Harrell; and having made and entered the appearance of said minors, the appearance of said guardian ad litem and the appearance of said guardian; and the intervenor Ben Hatcher, the duly appointed, designated, qualified, and acting trustee for all the right, title, and interest Simon Perry owns in and to the estate involved in this action, appearing in person, and by his attorneys Hatcher & Kice, and having made and entered his appearance herein, and each and all of said defendants and said intervenor having filed their respective

answers. And the unknown heirs, executors, administrators, devisees, trustees, and assigns, immediate and remote of the following deceased persons: Alice Harjo, and Edward Perry, if any, if living, and if not living, and each and all of them, although three times called in open court to except, answer, demur, or otherwise plead, comes not but makes default; and the court having examined the files in said cause and being fully and sufficiently advised in the premises, finds:

That the defendants, the unknown heirs and executors, administrators, devisees, trustees, and assigns, immediate and remote, of Alice Perry nee Harjo, Chickasaw roll No. 572, deceased; and Edward Perry, deceased, having been regularly and duly served with summons by publication as provided by law, which service of summons has been duly examined, found in all respects to be complete and
8 regular and the proof thereof is ample and sufficient and the same is in all respects approved.

It is therefore ordered that the defendants, the unknown heirs, executors, administrators, devisees, trustees, and assigns, immediate and remote, of the said Alice Perry nee Harjo, deceased, and said Edward Perry deceased, if living, and if not living, each and all of them, be, and they are hereby adjudged in default.

That thereupon this cause coming on for trial and the court having further examined the files and pleadings in this cause, and having heard and considered all the testimony offered and being fully and sufficiently advised in the premises, upon submission of the issue, finds:

That this action pertains and relates to real property hereinafter described and situated in the county of Pontotoc, State of Oklahoma. That Alice Perry nee Harjo, a member of the Chickasaw Tribe of Indians, duly and regularly enrolled upon the approved rolls of the Five Civilized Tribes of Indians in the name of Alice Harjo as of one-half degree Indian blood and opposite Chickasaw roll No. 572, died intestate in, and an actual resident of the county of Pontotoc, State of Oklahoma, on or about the 22nd day of June, 1923.

That the said Alice Perry at the time of her death, left surviving her, as her sole and only heirs at law, her husband, Edward Perry; her children, Lucille Perry and

Alonzo Perry, minors, the said Edward Perry not being the father of said children but a stepfather.

That the said Edward Perry, deceased, died intestate in, and an actual resident of the county of Pontotoc, State of Oklahoma, on or about the 15th day of October, 1923, and at the time of his death, left surviving him, as his sole and only heirs at law, his father, said Simon Perry and his mother, Cicen Nelson, nee Perry; that said Simon Perry is duly enrolled as a Chickasaw Indian, upon the final approval rolls of the Five Civilized Tribes of Indians, opposite Chickasaw roll No. 720, and that said Cicen Nelson, nee Perry, is duly enrolled as a Chickasaw Indian, upon the final approved rolls of the Five Civilized Tribes of Indians, as Cicen Perry, opposite Chickasaw roll No. 721.

That the following described real property, to wit:

Lots 8 and 9 of section 19 and the northwest quarter of section 20, township 5 north, range 8 east, containing 215.60 acres and being located and situated in Pontotoc County, Oklahoma.

and was duly and regularly allotted by the Choctaw and Chickasaw Nations to the aforesaid Alice Perry, nee Harjo, as her homestead allotment, which homestead allotment was, after her death, held for the use and benefit of the said Lucille Perry and Alonzo Perry, minors, until their death or until April 26th, 1931, as provided by law; each of said minors having been born after March 4th, 1906.

That the said Alice Perry, nee Harjo, died seized and possessed of all of the aforesaid real property, and that the said Edward Perry, died seized and possessed of the interests he inherited in said real estate, which he inherited from said Alice Perry, nee Harjo, his wife; that all of the aforesaid real property, passed to the above and
9 hereinafter referred to heirs, free and clear of any and all liens and encumbrances of whatever nature.

That by virtue of the law of descent and distribution in force and effect at the time of the death of said Alice Perry, nee Harjo, the title in and to all of the hereinbefore described real property became vested in the aforesaid heirs, viz: Edward Perry, her husband, Lucile Perry, and Alonzo Perry, minors, her children; and that each of said heirs in-

herited an undivided one-third interest in and to said real estate.

And that by virtue of the laws of descent and distribution in force and effect at the time of the death of said Edward Perry all the right, title, and interest that he inherited in and to said real estate became vested in his heirs, said Simon Perry, his father, and said Cicen Nelson, nee Perry, his mother, and that the interest that the heirs inherited in and to his estate is set out opposite their respective names, viz:

Lucille Perry an undivided one-third interest.

Alonzo Perry an undivided one-third interest.

Simon Perry an undivided one-sixth interest.

Cicen Nelson nee Perry an undivided one-sixth interest.

That the court further finds that said Edward Perry did, on the 14th day of July, 1923, by general warranty deed, attempt to convey all his right, title, and interest in and to the aforesaid described real property to Lucille Perry and Alonzo Perry, and that on the same day the honorable Tal Crawford, county judge of Pontotoc County, Oklahoma, by order, attempted to approve said warranty deed, and that said warranty deed was filed for record in the office of the county clerk of Pontotoc County, Oklahoma, and recorded in Deed Book 41, page 448; and said order attempted to approve said deed was also filed in the office of county clerk of Pontotoc County, Oklahoma, on the 14th day of July, 1923, and recorded in Book 314, pages 398-409.

And the court finds that at the time of the execution of said deed and making of said order, that said land was the homestead allotment of the said Alice Perry, nee Harjo, deceased, and that upon her death she left surviving her, her children, said Lucille Perry, a minor, and Alonzo Perry, a minor, and that said real property was inalienable during the life or lives of said minors and until April 26th, 1931, and that said real property was restricted in the hands of the heirs during their life or lives and until April 26th, 1931, and that said deed is void and said order is void, they having been made and executed in violation of the Federal restrictions and that said deed and said order should be, by decree of this court, vacated, canceled, set aside, and held for naught.

The court further finds that said Simon Perry is a full-blood Chickasaw Indian, enrolled on the final approved rolls of the Five Civilized Tribes, as a Chickasaw opposite roll No. 720, and that subsequent to the filing of this suit, and on the 27th day of April, 1931, the said Simon Perry, did make, execute, and enter into a trust agreement, in writing by and between himself and said Ben Hatcher, intervenor herein, and that by the covenants, agreements, and stipulations contained in said trust agreement, the said Simon Perry conveyed all his right, title, and interest in and to said real estate to the said Ben Hatcher to
10 be by him held in trust for the use and benefit of said Simon Perry in accordance with the terms, stipulations, conditions, and covenants set out in said agreement. And that said trust agreement has been duly and legally approved by the County Court of Pontotoc County, Oklahoma, and same is binding and in full force and effect upon the said Simon Perry.

The court further finds that the aforesaid parties Lucille Perry, Alonzo Perry, Simon Perry, and Cicen Nelson nee Perry, are the sole and only heirs in and to the above-described real property, and the estate of the said Alice Perry nee Harjo, deceased, and that they are the owners in fee and entitled to the actual peaceable possession of all the real property hereinafter described.

And the defendants, th unknown heirs, executors, administrators, devisees, trustees, and assigns immediate and remote of said Alice Perry nee Harjo, deceased; and of Edward Perry deceased, if living, and if not living, have no right, title, interest, or estate or equity in or to any part or parcel of said real property or any claim or interest therein.

It is therefore considered ordered adjudged and decreed by the court, that the title in and to all the above and hereinafter described real property, be cleared and quieted in the said Lucille Perry, Alonzo Perry, Simon Perry, and Cicen Nelson nee Perry and that any and all persons, including the unknown heirs, executors, administrators, trustees, and assigns, immediate and remote of Alice Perry nee Harjo, deceased, and Edward Perry, deceased, if living, and if not living, be and they are hereby, excluded from any right, title, interest, estate, or equity in and to any part or parcel of the above and foregoing and hereinafter de-

scribed real property, which said real property is described as follows, to wit:

Lots 8 and 9 of section 19 and the northwest quarter of section 20, township 5 north, range 8 east, Pontotoc County, Oklahoma.

That the undivided interest of the aforesaid parties in and to all the aforesaid real property is set out opposite their names, to wit:

Lucille Perry, undivided one-third interest.

Alonzo Perry, undivided one-third interest.

Simon Perry, undivided one-sixth interest.

Cicen Nelson, nee Perry, undivided one-sixth interest.

It is further ordered, adjudged, and decreed, that the general warranty deed executed on the 14th day of July, 1923, by Edward Perry to Lucille Perry and Alonzo Perry, recorded in Book 41, page 448, in the office of the county clerk of Pontotoc County, Oklahoma, be and the same is hereby declared null and void and is hereby canceled and held for naught, and that the same be and is hereby canceled of record.

It is further ordered, adjudged, and decreed, that the trust agreement between said Simon Perry and said Ben Hatcher, intervenor, be and the same is declared to be valid and binding and that said Ben Hatcher be, and he is hereby, declared to hold and own the title in trust inherited by said Simon Perry in and to said real estate by virtue of said trust agreement.

It is further ordered and decreed by the court that said heirs be and they are entitled to actual peaceable possession of all said real property according to their respective interest.

11 It is further ordered and decreed that defendants pay all costs in and about this suit expended.

HAL JOHNSON,

Judge.

O. K.

BRUNSON, KEMP & AHRENS,

Attys. for Plaintiff.

O. K.

HATCHER & KICE,

Attys. for Ben Hatcher, Trustee.

O. K.

HARRELL & KERR,

Attysl for Guardian and Guardian ad litem.

Filed 6/2/31.

BILL SUMMERS,

Court Clerk, Pontotoc County, Okla.

By O. B. WILFONG,

Deputy.

PLAINTIFF'S EXHIBIT C.

In the County Court of Pontotoc County, Oklahoma.

No. 2314.

In the Matter of the Guardianship of Alonzo Perry, a
Minor. G. W. Busby, Guardian.*Order Approving Employment Agreement.*

Now on this 3rd day of February, 1932, this matter coming on for hearing in open court on the application of G. W. Busby, as guardian of Alonzo Perry, a minor, for approval of a certain contract of employment made and entered into between said G. W. Busby, guardian of Alonzo Perry, a minor, and Harrell & Kerr, Hatcher & Kice, and Bond, Hatcher and Bond, attorneys, on February 1, 1932, a copy of which contract is attached to said application herein;

And the court being fully advised finds, after careful consideration, that said contract of employment should be approved and said attorneys instructed to proceed accordingly:

It is, therefore, ordered, adjudged, and decreed that said contract be, and the same hereby is, in all things confirmed and approved, and said attorneys, Harrell and Kerr, Hatcher & Kice, and Bond, Hatcher & Bond, are hereby authorized to proceed in accordance with the terms of said contract.

[SEAL.]

CLAUDE V. THOMPSON,

*County Judge of Pontotoc County, Oklahoma.**Application for Approval of Contract.*

Comes now G. W. Busby, guardian of Alonzo Perry, a minor, and would show to this honorable court that on February 1, 1932, said guardian made, executed, and entered

into as such guardian, a certain contract of employment with Harrell & Kerr and Hatcher & Kice and Bond, Hatcher & Bond, attorneys, by the terms of which contract this guardian employed said attorneys to secure the release of the funds and property belonging to Alonzo Perry, a minor, from the Secretary of Interior Department
12 of Federal Government, and from any other person or agencies having control of same in order that said funds and the profits coming from said property may be invested in more remunerative ways according to law; a copy of said contract of employment is hereto attached marked "Exhibit A" and by this reference made a part of this application;

Your applicant would respectfully show that said funds will pay much greater returns and profits if withdrawn from the depository of the Federal Government, and invested in productive stocks or securities and real estate, according to law;

Wherefore, the undersigned, G. W. Busby, guardian of Alonzo Perry, a minor, respectfully asks that said contract of employment be approved and that said attorneys be authorized by this court to proceed accordingly.

G. W. BUSBY,

Guardian of Alonzo Perry, a Minor.

Contract of Employment.

Now on this 1st day of February, 1932, it is stipulated and agreed by and between G. W. Busby, as guardian of Alonzo Perry, a minor, hereinafter designated as first party, and Harrell & Kerr, Hatcher & Kice, and Bond, Hatcher & Bond, hereinafter designated as second party, witnesseth:

Whereas said Alonzo Perry, a minor, has on deposit at Muskogee, Oklahoma, or Washington, D. C., in the possession or under the control of the Secretary of Interior Department of the Federal Government a certain sum of money amounting to approximately \$60,000.00, more or less, which sum of money is drawing a very low rate of interest;

And whereas said Alonzo Perry, a minor, is the owner of an undivided one-third interest in and to the following-described real estate, to wit:

Lots eight (8) and nine (9) of section nineteen (19), and the northwest quarter of section twenty (20), township five north, range eight east, containing 215.6 acres and being located and situated in Pontotoc County, Oklahoma;

the income from which real estate is being received and held by the Secretary of Interior Department of Federal Government and kept under the control and in the possession of said department;

And whereas the undersigned G. W. Busby, guardian of said Alonzo Perry, a minor, is of the opinion that it is for the best interests of said Alonzo Perry, a minor, and for the best interest of said minor's estate that said sum of money be released and withdrawn from said Secretary of Interior Department of the Federal Government and be invested in securities and real estate as prescribed by law, at a higher rate of interest and for better profits;

And whereas said guardian is of the further opinion that the control of said real estate should be withdrawn from said department and that the profits from said real estate should be received by said guardian for the reason that it is for the best interests of said minor that said profits be invested as aforesaid;

13 And where as the undersigned attorneys are competent, capable, and efficient, and are practicing attorneys at the bar of the State of Oklahoma, and are willing to accept employment herein.

Now therefore, first party does hereby employ second party to perform all acts and to do all things necessary and proper to bring about the release to first party of all money and property belonging to Alonzo Perry, a minor, from the Secretary of Interior Department of Federal Government and its various agents and departments, and from any other person or agent having control of same; and second party does hereby accept such employment; and for such services rendered in bringing about the release of such money and property belonging to said Alonzo Perry from said Secretary of Interior Department and from any person or agency holding same to first party, as guardian of said minor, second party is to receive a reasonable fee for such services rendered, which sum must be agreed upon by the parties

hereto and approved by the County Court of Pontotoc County, Oklahoma, after said services are rendered by second party, and said money and property, or either, is released.

It is further agreed and understood that this contract of employment supplants and takes the place of a certain contract of employment made on November 28, 1931, by and between first party and Harrell & Kerr and Hatcher & Kice, and said contract of November 28, 1931, is merged into this contract.

Witness our hands and seals the day and year first above written.

G. W. BUSBY,
Guardian of Alonzo Perry, a Minor, First Party.

HARRELL & KERR AND
HATCHER & KICE AND
BOND, HATCHER & BOND,
Attorneys.

By B. HATCHER,
Second Party.

Subscribed and sworn to before me this 1st day of February, 1932.

[SEAL.]

VIVIAN MILLER,
Notary Public.

My commission expires October 3, 1935.

PLAINTIFF'S EXHIBIT D.

In the Matter of the Guardianship of Alonzo Perry, a
Minor. G. W. Busby, Guardian.

*Demand for Delivery of Funds and Moneys and Other
Evidences of Credit Held in Connection with the Estate
of Alice Perry, neé Harjo, Deceased, and Belonging to
the Minor, Alonzo Perry.*

To the Honorable Ray Lyman Wilbur,
Secretary of the Interior:

You are respectfully notified and advised that Alice Perry, neé Harjo, deceased, died on or about the 22d day of June, 1923, enrolled upon the approved rolls of the Chickasaw Tribe of Indians, opposite roll No. 572, as Indian of the one-half blood; that she died in Pontotoc County, Okla-

homa, while a resident in good faith of that county; and
that a decree determining the heirship has been
14 duly entered in the district court within and for said
county, by which her husband, Edward Perry and
her children, Lucille Perry and Alonzo Perry were ad-
judged to be the sole surviving heirs of the deceased; that
the deceased at the time of her death was seized and pos-
sessed of homestead allotment, allotted to her as a member
of the Chicasaw Tribe of Indians and being more particu-
larly described as follows:

Lots eight (8) and nine (9) of section nineteen (19) of
the N. W. $\frac{1}{4}$ of section twenty (20), township 5 north, range
8 east, containing 215.6 acres, according to the U. S. Gov-
ernment survey thereof;

that there was received from said homestead allotment oil
and gas royalties and rentals in an amount approximating
\$60,000.00 to which Alonzo Perry through his guardian is
entitled, which sum was received by and is now in the pos-
session of the Secretary of the Interior or his subordinate
officers; that Alonzo Perry was born since March 4, 1906;
that his deceased mother was enrolled as an Indian of the
one-half blood and restricted under the act of Congress of
May 27, 1908, and said homestead was restricted for benefit
of issue born since March 4, 1906; that the restriction pro-
vided for in section 9 of the act of Congress last mentioned,
terminated on April 26, 1931; that said funds are now free
from restrictions and should be delivered to the guardian
of said minor for the use and benefit of said ward.

You are respectively advised that the undersigned is in-
formed and believes that there is now in the hands of the
Secretary of the Interior or his subordinate officers, ap-
proximately \$60,000.00 which belongs to and should be paid
over to Alonzo Perry, a minor, and demand is made there-
for and you are advised that unless same is voluntarily
paid over to the guardian of said ward, legal proceedings
will be instituted within fifteen (15) days from this date to
compel a delivery of same to G. W. Busby, guardian of
Alonzo Perry, a minor.

Dated this 7th day of May, 1932.

CHARLES H. MERILLAT,
*Counsel for said Guardian G. W. Busby
and His Ward, Alonzo Perry, Minor.*

PLAINTIFF'S EXHIBIT E.

United States Department of the Interior.

Office of Indian Affairs.

Washington, May 22, 1932.

Mr. Charles H. Merillat,
Attorney at Law,
Woodward Building,
Washington, D. C.

DEAR SIR:

The Department desires to acknowledge the receipt of your demand, as attorney for G. W. Busby, guardian of Alonzo Perry, a 9/16 Chickasaw, minor, for the release of certain funds in the account of the said minor, under the jurisdiction of the superintendent of the Five Civilized Tribes Indian Agency, Muskogee, Okla.

The funds in the case are oil and gas royalties inherited by Alonzo Perry from the restricted homestead of his deceased mother, Alice Perry, nee Harjo, and accrued from a departmental lease thereof.

15 Some question having arisen as to whether the funds of heirs born since March 4, 1906, as Alonzo Perry was, are restricted since April 26, 1931, a bill declaring such funds to be restricted was recently passed by the House of Representatives and is now pending before the Senate. Moreover, several suits filed for the purpose of testing the question, are pending in the courts of the District of Columbia. In view of this situation we do not feel disposed to release the funds of Alonzo Perry at this time, and your request therefor on behalf of the guardian is accordingly denied.

Sincerely yours,

C. J. RHOADS,
Commissioner.

JOS. M. DIXON,
First Assistant Secretary.

Approved May 21, 1932.

Rule to Show Cause.

Filed June 3, 1932.

* * * * *

On consideration of the petition filed herein on the 3d day of June, 1932, by the United States of America ex relatione Alonzo Perry, a minor, by his legal guardian, G. W. Busby, it is by the court this 3d day of June, 1932,

Ordered that the said Ray Lyman Wilbur, Secretary of the Interior, be and he hereby is ordered to show cause on or before the 14th day of June, 1932, why writ of mandamus should not issue out of this court commanding him to state the amount of funds and property in his custody, possession, or under his control belonging to Alonzo Perry, minor, and his legal guardian, G. W. Busby, petitioner herein, and to turn over to said C. W. Busby, legal guardian of Alonzo Perry, minor, all the moneys, funds, and property belonging to said Alonzo Perry, minor, as prayed in the petition filed in this cause.

JESSE C. ADKINS,
Justice.

Marshal's Return.

Served a copy of the within above rule on Ray Lyman Wilbur, Secty. of the Interior, 6-3-32. Personally.

EDGAR C. SNYDER,
*U. S. Marshal in and for
the Dist. of Columbia,*

By E. A. SACEY,
Deputy U. S. Marshal.

Response to the Rule and Answer to the Petition.

Filed June 14, 1932.

* * * * *

The defendant, in response to the rule to show cause and for answer to the allegations of the petition, says:

1. He admits the allegations of paragraph 1 except he denies that any authority or jurisdiction rests in the court over restricted Indian money.

16 2. He admits his citizenship, official status, and temporary residence, as alleged. If the language "unlawful and contrary to law," "usurp possession and control," is confined to the purpose and manner in which he is sued herein, he admits the further allegation of paragraph 2; otherwise, that portion thereof is denied.

3. On information and belief he admits the allegations of paragraph 3.

4. On information and belief he admits the allegations of paragraph 4.

5. He admits the allegations of paragraph 5.

6. He admits the allegations of paragraph 6.

7. Relative to the allegations of paragraph 7 he admits that he has in his possession and under his official control at this time the approximate sum of \$60,000 which constitutes the share of Alonzo Perry in the money belonging to the estate of his deceased mother. He denies that the petitioner has a lawful right to the possession thereof and denies that the fund is subject to the orders of the Oklahoma Probate Court; he alleges that said fund is restricted money and lawfully under the official control and supervision of the Secretary of the Interior.

8. He admits that an attorneys' contract was made between the petitioner and certain attorneys at law, which was approved by the court, as alleged, but he denies each and every further allegation contained in paragraph 8.

9. He is not informed respecting the authority of counsel as set forth in paragraph 9, but he admits that the demand upon him on May 7, 1932, was made, as alleged, and that he declined to comply therewith.

10. He denies each and every allegation and averment contained in paragraph 10. Further answering said paragraph, he admits that a bill has passed the House of Representatives and is now pending before the Senate, or a Senate committee, having for its purpose the placing of specific restrictions on all moneys and funds belonging to half-blood or more than half-blood heirs of the Five Civilized Tribes in the possession of the Secretary of the Interior; that, in the event such legislation shall become a law, it will remove such doubt as now exists of the legality of retaining possession of inherited funds by the Secretary of the Interior and will protect such class of Indians against the certain dissipation of their moneys and will permit the

conservation thereof by the proper officers of the Government of the United States.

11. Further answering the allegations of the petition as a whole, the defendant says that the fund in controversy came into the hands of the Secretary of the Interior as royalty accruing from the sale of oil and gas extracted from the restricted allotment of the deceased mother of petitioner's minor ward, by virtue of the provisions of a departmental lease, lawfully executed and duly approved by the Secretary of the Interior; that the defendant, as Secretary of the Interior, is the exclusive, lawful custodian of the mineral rents and profits derived from the restricted lands of enrolled tribal Indians and that such money constitutes a trust, separate and distinct from the land from which it accrued; that until such time or times as the relinquishment or payment thereof is considered best for the

benefit of said lessor, or his or her heirs, he may
17 retain the custody and control thereof; that the delivery of such a fund, even to a duly appointed and qualified custodian, will not insure its reasonable conservation nor tend to keep the sum intact for the benefit of its minor owner, but, on the contrary, from time to time, upon lawful court orders, under the guise of necessity, and upon statutory authority, it will soon vanish and said ward become impoverished; that this allegation is made as a fact which is indisputable and wholly without intent to reflect criticism upon any guardian or upon any court. This condition has resulted from the relinquishment of Indian funds, as a rule, and for this reason, among others, the defendant has given his official approval to said bill pending before Congress. Thereby he does not admit said fund to be unrestricted, but in giving his approval thereto, does it that the Congress may enact said law and make clear that which is now doubtful.

12. Further answering the allegations of the petition as a whole, defendant says that the petition fails to disclose clearly any lawful duty incumbent on the Secretary of the Interior which is by him unperformed, and hence fails to state facts sufficient to warrant this court in granting a writ of mandamus.

13. Further answering the allegations of the petition as a whole, defendant states that the action of the Secretary of the Interior in retaining possession of the fund involved herein and in declining to deliver the same to the peti-

tioner's said attorneys, or to the petitioner, by virtue of the demand by them made, was taken in the exercise of his judgment and discretion as a quasi-judicial tribunal and is conclusive upon this court in this proceeding for a writ of mandamus.

14. Further answering the allegations of the petition as a whole, the defendant says that, under the allegations of the petition, this court has no jurisdiction to award the relief sought thereby.

Wherefore, defendant, having responded to the rule to show cause and having answered the allegations of the petition, prays the court that he may go hence without day with all his costs.

JOHN H. EDWARDS,
As Acting Secretary of the Interior.

DISTRICT OF COLUMBIA, ss:

John H. Edwards, Acting Secretary of the Interior, being first duly sworn, on his oath says that he has read the foregoing answer by him subscribed and knows the contents thereof, and that the matters therein stated of his own knowledge are true, and those stated on information and belief he believes to be true.

JOHN H. EDWARDS,
Acting Secretary of the Interior.

Subscribed and sworn to before me this 13 day of June, 1932.

[NOTARIAL SEAL.] W. BERTRAND ACKER,
Notary Public in and for the District of Columbia.

E. C. FINNEY,
Solicitor, Department of the Interior,
O. H. GRAVES,
Assistant to the Solicitor,
Attorneys for the Defendant.

18

Demurrer.

Filed June 21, 1932.

* * * * *

Comes now the plaintiff and relator and says that the answer of the defendant Ray Lyman Wilbur, Secretary of the Interior, to the petition of plaintiff in the above-entitled

cause is bad in substance and contains no sufficient reason for the withholding of money of the petitioner by the Secretary of the Interior after his statutory authority therefor has ceased and determined.

C. H. MERILLAT,
Attorney for Plaintiff.

NOTE.—Among the points to be argued is that the answer sets forth no good and sufficient reason in law why the writ of mandamus should not issue commanding the defendant to transfer and deliver to the plaintiff and relator moneys in his hands belonging to Alonzo Perry, minor, the statutory period whereby the defendant as a public officer was entitled to retain as restricted funds the moneys of said Alonzo Perry having expired and the right to hold said funds ceased and determined.

2. That the defendant Secretary of the Interior is a public officer whose acts must be justified by statutory authority and no statute or lawful authority exists or is cited authorizing the Secretary of the Interior or his subordinates to retain custody of funds of Alonzo Perry, minor, originally lawfully held by officials of the Government of the United States.

3. That by the statutes in such cases made and provided the funds belonging to and forming property of Alonzo Perry, minor, are properly under the control of the probate court of Pontotoc County, Oklahoma, and G. W. Busby, as guardian of Alonzo Perry, minor.

Solicitor's Opinion.

Filed June 27, 1932.

United States Department of the Interior.

Office of the Solicitor,
Washington, August 11, 1930.

M. 26067.

The Honorable the Secretary of the Interior.

MY DEAR MR. SECRETARY:

At the suggestion of the Commissioner of Indian Affairs you have requested my opinion upon the following ques-

tions dealing with the restrictions upon lands and funds of the members of the Five Civilized Tribes in Oklahoma.

1. Will the restrictions now attaching to accumulated funds derived from restricted lands allotted to members of the Five Civilized Tribes terminate on April 26, 1931, the date of expiration of the present restrictions imposed upon such lands by sections 1 and 9 of the act of May 27, 1908 (35 Stat. 312), or do sections 1 and 2 of the act of May 10, 1928 (45 Stat. 495), extending the existing restrictions against the lands for an additional period of 25
19 years, also extend the restrictions upon such accumulated funds for a like period?

2. What is the legal effect of the repeal by section 2 of the act of May 10, 1928, of the provision in section 9 of the act of 1908, as amended, creating for the issue born since March 4, 1906, a special estate in the homestead of a deceased allottee of one-half or more Indian blood with respect to termination of restrictions upon such homestead as well as the accumulated income therefrom?

3. Admitting that the special estate created in favor of the issue born since March 4, 1906, terminates on April 26, 1931, do the accumulated funds on hand derived from the homestead then become the absolute property of such issue, or is it divisible among all the heirs of the decedent in accordance with their respective interests under the laws of the State of Oklahoma?

Before discussing these somewhat complicated questions it may be well to refer briefly to the status of the lands involved with respect to the restrictions upon alienation existing thereagainst prior to the restrictions extension act of 1928, as well as the scope of the latter act.

The Five Civilized Tribes originally owned extensive areas of land in what is now the State of Oklahoma. Division of these lands, which were held in communal ownership, was had through allotments in severalty to the individual members of the tribes, pursuant to agreements negotiated with the several tribes for that purpose, which agreements provided for varying periods of nonalienability and nontaxability. With these agreements, however, we are not here concerned, as Congress by the act of May 27, 1908 (35 Stat. 312), provided a new and uniform scheme of restrictions applicable alike to all of the Five Civilized Tribes. Section 1 of that act dealt with the restrictions

upon allotted lands of living allottees, and for that purpose divided such lands into three classes based upon the Indian blood of the allottees. First, both homestead and surplus allotments of allottees having less than one-half Indian blood. Second, surplus allotments of allottees of half and less than three-fourths Indian blood. Third, homesteads of allottees of one-half or more Indian blood, and both homestead and surplus allotments of allottees having three-fourths or more Indian blood. Lands of allottees in classes one and two were freed from all restrictions, but as to lands within the third class Congress declared that they "shall not be subject to alienation, contract to sell, power of attorney, or any other encumbrance prior to April 26, 1931, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

Section 9 of the same act dealt with the restrictions upon lands of deceased allottees and provided:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of
20 said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section 1 hereof, for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions."

The above section was amended by the act of April 10, 1926 (44 Stat. 239), by extending, among other things, the

scope of the first proviso relating to conveyances by full-blood heirs so as to include within its provision full-blood devisees.

The death of an allottee under section 9 as interpreted by the courts operates to remove the restrictions upon alienation of the lands allotted to the decedent with two exceptions. First, lands inherited by or devised to full-blood members of the Five Civilized Tribes, and as to them the Supreme Court of the United States in *Parker v. Richards* (250 U. S. 235) has held that the restrictions are not removed but merely relaxed to the extent of sanctioning such conveyances as receive the approval of the proper local court, which acts in that regard as a Federal agency. Further, that such lands in the hands of a full blood continue in the restricted class, and during the restricted period supervision over the collection, care, and disbursement of royalties accruing from a lease made during the lifetime of the allottee falls to the Secretary of the Interior. But where the lease is made by the full-blood heir, the Circuit Court of Appeals, Eighth Circuit, in a final decision from which no appeal was taken, has held that such a lease is a conveyance of an interest in the land, valid when approved by the proper local court and operating to terminate the jurisdiction and control of the Secretary of the Interior. See *United States v. Gypsy Oil Company* (10 Fed. 2d 487). While this decision is open to serious question as in conflict with the rule as laid down in *Parker v. Richards*, supra, the decision having become final must be accepted as controlling in the class of cases to which it applies, at least until overruled or modified by subsequent decisions of courts of equal or higher standing having occasion to reexamine the question. The second exception embraces homestead allotments of deceased allottees of one-half or more Indian blood, leaving issue born since March 4, 1906, such homesteads being restricted and inalienable for the use and support of such issue during lifetime but not beyond April 26, 1931.

The act of May 10, 1928, extending restrictions upon these lands, so far as material, reads:

“SEC. 1. That the restrictions against the alienation, lease, mortgage, or other encumbrance of the lands allotted to members of the Five Civilized Tribes in Oklahoma, en-

rolled as of one-half or more Indian blood, be, and they are hereby, extended for an additional period of twenty-five years, commencing on April 26, 1931: *Provided*,

21 That the Secretary of the Interior shall have the authority to remove the restrictions, upon the applications of the Indian owners of the land, and may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.

“Sec. 2. That the provisions of section 9 of the act of May 27, 1908 (Thirty-fifth Statutes at Large, page 312), entitled ‘An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes,’ as amended by section 1 of the act of April 12, 1926 (Forty-fourth Statutes at Large, page 239), entitled ‘An act to amend section 9 of the act of May 27, 1908 (Thirty-fifth Statutes at Large, page 312), and for putting in force, in reference to suits involving Indian titles, the statutes of limitations of the State of Oklahoma, and providing for the United States to join in certain actions, and for making judgments binding on all parties, and for other purposes,’ be, and are hereby, extended and continued in force for a period of twenty-five years from and including April 26, 1931, except, however, the provisions thereof which read as follows:

“‘*Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from restrictions; if this be not done, or in the event the issue hereinabove provided for die before April 26, 1931, the lands shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restriction: *Provided*, That the word “issue,” as used in this section, shall be construed to mean child or children: *Provided further*, That the provisions of section 23 of the act of April 26, 1906, as amended by this act, are hereby made applicable to all wills executed under this section.’ ”

which quoted provisions be, and the same are, repealed, effective April 26, 1931: *Provided further*, That the provisions of section 23 of the act of Congress approved April 26, 1906 (Thirty-fourth Statutes at Large, page 137), as amended by the provisions of section 8 of the act of Congress approved May 27, 1908 (Thirty-fifth Statutes at Large, page 312), be, and the same are hereby, continued in force and effect until April 26, 1956.

Section 1 above plainly extends for an additional period of 25 years the restrictions attaching to lands of living allottees under section 1 of the act of 1908, which, as we have seen, embraces homesteads of allottees of one-half or more Indian blood, and both homestead and surplus allotments of allottees of three-fourths or more Indian blood. It is also plain that section 2, while repealing the provision creating a special estate for the issue born since March 4, 1906, to homestead allottees of one-half or more Indian blood, likewise extends, for the same period, the restrictions attaching under section 9 of the act of 1908,

22 as amended, to lands inherited by or devised to full-blood members of the Five Civilized Tribes. With this situation in mind, we turn to the first question as to whether the extension of restrictions applies to funds now in the control of the Secretary of the Interior, representing the income derived from these restricted lands.

Section 2 of the act of 1908 declared that "leases of restricted lands for oil, gas, or other mining purposes * * * may be made with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

The funds here involved represent for the most part accumulated royalties from minerals produced under leases made and approved under this provision. The leases are on forms providing, in conformity with existing regulations, that the Secretary of the Interior, through his representatives, shall supervise all operations under the leases, that the royalties thereunder shall be paid to his representatives, that with certain exceptions the regulations then or thereafter in force should be deemed a part of the leases, and that supervision should only be relinquished in the event of removal of restrictions from the lands. The leases and the regulations thus contemplate continued supervision of the Secretary of the Interior over the collection, care, and disbursement of royalties so long as the lands remain re-

stricted, and in view of the action of Congress in extending the restrictions upon the lands for an additional period of 25 years, the event which otherwise would have terminated the Secretary's supervision and control over the leases and the royalties in 1931 will not then occur and may not thereafter occur until the restrictions expire in regular course in 1956.

The fact that the act of 1928 is an act extending restrictions upon lands, with no specific mention therein of funds, is unimportant. The act of 1908, like that which it amended, is a comprehensive measure, designed by Congress for the protection of the Indians against their own improvidence and overreaching by others. Admittedly, the need for such protection extends to the income from the lands as much as to the land itself, and, as was said by the Circuit Court of Appeals, Eighth Circuit, in *United States v. Brown* (8 Fed. 2d 564): "It would present a remarkable inconsistency in governmental policy if such funds were not subject to the same beneficial control as the lands from which they are derived."

From the viewpoint of governmental control no sound basis in fact exists for making any distinction between the lands and the income therefrom. The lands being restricted, the proceeds therefrom are likewise restricted and under the protecting care of the Federal Government. *United States v. Mott* (3 Fed. 2d 860). In authorizing the leasing of lands for oil, gas, or other minerals with the approval of the Secretary of the Interior, Congress permitted a change in the form of the property. No citation of authority is needed to sustain the doctrine that into whatever form trust property is converted it continues to be impressed with the trust. The rule is a salutary one and has been repeatedly applied to the trust or restricted property of the Indians. Thus, in *United States v. Thurston*

23 *County* (143 Fed. 287) it was held that the proceeds of the sales of allotted lands are held in trust by the United States for the same purposes as were the lands; that no change of form of property divests it of a trust, and that the substitute takes the nature of the original and stands charged with the same trust. Again, in *National Bank of Commerce v. Anderson* (147 Fed. 87) the Circuit Court of Appeals, Ninth Circuit, held that the sale of allotted lands, with the consent of the Secretary of the In-

terior, did not affect the trust which attached to the proceeds under the rules prescribed by the Interior Department. In that case the court said:

“We construe the act as expressing the intention of Congress, not to end the trust but to permit a change of the form of the trust property. The property being held in trust by the United States for a period which had not yet expired and which period was subject to further extension by the President, the intention to terminate the trust must be found to be clearly expressed in order to warrant us in holding that the trust does not follow the property in its changed form.”

Similar expressions will be found in *United States v. Gray* (201 Fed. 119) and *United States v. Moore* (284 Fed. 86). In *United States v. Brown, supra*, the rule was expressly applied to royalties derived from a lease upon restricted lands of a member of the Five Civilized Tribes, the court saying: “It must be conceded that the royalties accruing therefrom are lodged with the officers of that Department impressed with the same trust as are the lands themselves.” See also *Barnes v. Keys* (36 Oklahoma 6); *Strawn v. Brady* (84 Oklahoma 66); *Harris v. Brady* (136 Oklahoma 274); *Parker v. Riley* (250 U. S. 66). In the case last cited, the Supreme Court held that the royalties derived from a lease of the homestead allotment of a deceased member of the Five Civilized Tribes took the place *pro tanto* of the land as the lessee extracted and took the minerals and that the rights of the heirs in the royalties were the same as in the homestead.

It sufficiently appears from the foregoing decisions not only that the royalty interest of the lessee is but a right attached and incident to his ownership of the land but that the proceeds from the lands, whether derived from sale or lease, partake of the nature of the lands themselves and are impressed with the same trust. The status of the funds is thus determined by the status of the lands from which derived, and it therefore follows that the act of May 10, 1928, *supra*, extending restrictions upon the lands for an additional period of 25 years, *ipso facto*, extends for a like period the restrictions upon the funds.

As to the second question, it becomes necessary first to consider the matter of when the restrictions terminate upon the homestead of deceased allottees leaving issue born since March 4, 1906. The special estate therein belonging to such issue was, as we have seen, created by the second proviso to section 9 of the act of May 27, 1908, as amended by the act of April 10, 1926, *supra*. This proviso declared that the homestead should remain restricted and inalienable for the use and support of such issue during life, but not beyond April 26, 1931. The restrictions so imposed

24 were designed of course, for the protection of the owners of the special estate and were substantially the same as those attaching to lands of living allottees under section 1 of the act of 1908. Repeal of the proviso by section 2 of the act of May 1, 1928, *supra*, effective April 26, 1931, operates, of course, to terminate the special estate as of that date. But this does not necessarily mean that all restrictions against alienation of the homestead were then to terminate, as there is for consideration the first proviso of the same section, by which the sale of any interest inherited by or devised to a full-blood member of the Five Civilized Tribes is subject to the approval of the proper local court—a provision which, as hereinbefore pointed out, continues the restrictions in relaxed form in the hands of such full-blood Indians. True, the second proviso creating the special estate contains the provision that:

“If no such issue survives, then such allottee, if an adult, may dispose of his homestead by will, free from all restrictions; and if this be not done, or in the event the issue hereinbefore provided for, die before April 26, 1931, the land shall then descend to the heirs according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions.”

This provision, which indicates that upon the termination of the special estate the restrictions will terminate is undoubtedly broad, but so is the first proviso. As both are in the same section of the same act, they evidently were intended to operate harmoniously and should be construed accordingly. If the second proviso be regarded, as well it may, as contemplating the removal upon termination of the special estate, only of those restrictions imposed upon

the homestead for the protection of the owners of the special estate, the two provisions will operate in entire harmony and all full bloods will receive the measure of protection that Congress undoubtedly intended that they should have. While the matter is by no means free from doubt, I am constrained to hold that this is the true construction, and am therefore of the opinion that upon termination of the special estate in the homestead, the restrictions upon alienation of the lands are only removed where the heirs or devisees, as the case may be, are of less than the full blood and that where such heirs or devisees are of the full blood, their interests are subject to the restrictions attaching thereto under the first proviso of section 9 of the act of 1908, as amended, as interpreted in the cases of *Parker v. Richards* and *United States v. Gypsy Oil Company*, *supra*.

Having already determined in connection with the first question that the income falls in the same category as the lands from which derived, no other conclusion can be reached than that the expiration of the restricted or trust period on the lands terminates the restrictions upon the income. Nothing in the decision of the Circuit Court of Appeals in *United States v. Hinkle* (261 Fed. 518) makes to the contrary. That decision held that the exclusive control and custody of minerals, rents, and profits derived from restricted lands of full-blood tribal Indians of the Five Civilized Tribes were vested in the Secretary of the Interior as a trust fund separate and distinct from the trust estate in the land itself, and that the right to such

25 rents and profits *accruing during the term of restriction* can not be conveyed by the allottee or his heir. Doubtless the court, in holding that the mineral rents and profits constitute a trust fund separate and distinct from the land, had in mind that the Secretary of the Interior in the exercise of authority reposing in him under the law might remove the restrictions and terminate the trust as to one without impairing or disturbing the trust as to the other. That the two classes of property are separate and distinct to that extent is undeniably true, but the court did not consider, and hence did not decide, that the period of the trust as to the mineral rents and profits was any different from that fixed by Congress with respect to lands. Ample authority to the contrary will be found

in the decisions above cited, which support the doctrine that the proceeds from the land are impressed by the same trust as the lands themselves. It should be remembered in this connection that the power of Congress over the Indians and their property is plenary and that it is for that body to determine when its guardianship shall cease. *United States v. Nice* (241 U. S. 598); *Winston v. Amos* (255 U. S. 373). Whenever Congress has so determined, the supervision and control theretofore exercised by the Secretary of the Interior as the agent selected by Congress to perform its guardianship powers necessarily come to an end.

The third question presents little difficulty. It is controlled by the decision of the Supreme Court of the United States in *Parker v. Riley*, *supra*, wherein the rights of the heirs and the owners of the special estate in the homesteads of deceased allottees leaving surviving issue born since March 4, 1906, were defined as follows:

“Thus the rights of all in the royalties were the same as in the homestead. Nothing in the act of May 27, 1908, makes to the contrary. Under the provision in section nine specially providing for issue born after March 4, 1906, Julia was entitled for her support to the exclusive use of the entire homestead while she lived, but not beyond April 26, 1931, and those who took the fee took it subject to that right. The rights of all in the royalties must, as we think, be measured by that standard. In this view Julia is entitled to the use of the royalties, that is to say, the interest or income which may be obtained by properly investing them, during the same period, leaving the principal, like the homestead, to go to the heirs in general on the termination of her special right.”

Obviously, under the foregoing decision the accumulated funds on hand derived from the homestead do not upon termination of the special estate become the absolute property of the issue born since March 4, 1906, but are for distribution among the heirs in accordance with their respective interests under the applicable laws of descent and distribution.

Respectfully,

E. C. FINNEY,
Solicitor.

Approved August 11, 1930.

JOS. M. DIXON,
First Assistant Secretary.

26

Memorandum.

Filed September 16, 1932.

* * * * *

It is admitted by all counsel in this case that the land involved in this case became unrestricted on April 26, 1931.

As I read the opinion of Solicitor Finney dated August 11, 1930, he concludes that the accumulated funds on hand derived from such land likewise became unrestricted on April 26, 1931.

The conclusion in my opinion is correct. Therefore in my judgment the answer states no defense to the petition for the writ of mandamus.

The demurrer to the answer is sustained.

September 15, 1932.

JESSE C. ADKINS,

Justice.

Judgment.

Supreme Court of the District of Columbia.

Friday, September 30, 1932.

Session resumed pursuant to adjournment, Hon. Chief Justice Alfred A. Wheat presiding.

* * * * *

Comes now the petitioner by his attorney of record and prays that the writ of mandamus issue in this action against the respondent because of his failure to amend herein within the time allowed by the court. Whereupon, it appearing to the court that a demurrer to the answer of said respondent was sustained on the 16th day of September, 1932, and no amendment has been filed thereto, it is ordered that judgment be entered in accordance therewith.

Wherefore, it is ordered that the prayers of the petition herein be, and the same are hereby each and severally granted, and that a writ of mandamus do forthwith issue out of the clerk's office of this court directed to the respondent herein and commanding him to turn over to G. W. Busby, legal guardian of Alonzo Perry, minor, all the

moneys, funds, and property belonging to Alonzo Perry, minor, and now held or claimed to be held by the defendant Ray Lyman Wilbur, Secretary of the Interior, and his subordinates, in conformity with the prayers of petition herein.

From the foregoing judgment the respondent by his attorney of record, in open court, notes an appeal to the Court of Appeals of this District.

* * * * *

27 Supreme Court of the District of Columbia.

Monday, May 22, 1933.

Session resumed pursuant to adjournment, Hon. James M. Proctor, Justice, presiding.

* * * * *

Comes now the respondent by his attorney and presents to the Court the mandate of the Court of Appeals filed herein on the 21st day of April, 1933, and prays judgment in accordance therewith and it appearing to the Court that said mandate reverses the judgment entered in this cause upon the 30th day of September, 1932, it is ordered that said judgment be, and the same is hereby vacated, set aside and for naught held and this cause is reinstated for further proceedings.

Whereupon, comes now the petitioner by his attorney of record and elects to stand upon the demurrer filed herein, to the answer. Whereupon, it is ordered that said demurrer be, and the same is hereby overruled and that the petition for a writ of mandamus be, and the same is hereby dismissed and the rule issued thereon discharged.

Wherefore, it is considered that petitioner take nothing by this action, that respondent go hence without day, be for nothing held and recover of petitioner his costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing judgment the petitioner by his attorney of record, in open Court, notes an appeal to the Court of Appeals of this District; whereupon, an undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars (\$100.00) with leave to deposit Fifty Dollars (\$50.00) cash with the clerk in lieu thereof.

28

Memorandum.

June 8, 1933.

\$50 depoisted in lieu of undertaking on appeal.

Supreme Court of the District of Columbia.

Thursday, July 20, 1933.

Session resumed pursuant to adjournment, Hon. O. R. Luhring, Justice, presiding.

* * * * *

It appearing to the Court that a substitution of a new party defendant was inadvertently left out of the order entered herein on the 22nd day of May, 1933, it is this day ordered that said entry of May 22, 1933 be, and the same is hereby amended so as to read as follows: Upon oral motion of the plaintiff herein, it is ordered that Harold L. Ickes, new Secretary of the Department of the Interior, be, and is hereby substituted as party defendant in the place and stead of Ray Lyman Wilbur.

Assignment of Errors.

Filed July 25, 1933.

* * * * *

The plaintiff alleges that errors were committed herein by the Supreme Court of the District of Columbia and the Court of Appeals in the following particulars:

1. In directing to be overruled and in overruling plaintiff's demurrer to defendant's answer.

2. In directing and in entering final judgment against plaintiff with costs.

29 3. In not holding that moneys due plaintiff accumulated in the hands of the Secretary of the Interior as restricted funds had become unrestricted on April 26, 1931, by the death of the allottee and were payable to plaintiff under the order of the county court of Pontotoc county, Oklahoma, and that the Secretary of the Interior was unlawfully withholding possession of said funds from plaintiff.

4. In not holding that the Secretary of the Interior having no rightful possession of the funds of Alonzo Perry when the act of January 27, 1933, was passed the fact that by wrongful usurpation he was in physical possession of said funds on January 27, 1933, did not bring said funds within his control under said act of January 27, 1933.

5. In not holding that the act of January 27, 1933, would be unconstitutional if applied retroactively so as to oust the control of the funds in controversy from the county court which in pursuance of a lawful jurisdiction vested in it had passed judicial orders and judgment with reference to said funds prior to the act of January 27, 1933.

6. In not construing the act of January 27, 1933, prospectively so as to avoid constitutional doubts arising by construing the act as having retroactive operation and thereby permitting Executive interference with the lawful jurisdiction of the proper courts of the State of Oklahoma over the funds at the time the act was passed.

C. H. MERILLAT,
Attorney for Plaintiff.

30 *Designation of Record.*

Filed July 25, 1933.

* * * * *

The Clerk in making up the record herein will include the following:

1. Petition for mandamus together with all exhibits thereto.

2. Rule to show cause.

3. Response to rule and answer to petition.

4. Demurrer of plaintiff.

5. Solicitor's opinion and memorandum of court signed September 15, 1932.

6. Journal entry of this court's judgment granting mandamus.

7. Memo. of defendant's appeal to Court of Appeals.

8. Judgment entered on mandate of Court of Appeals, with journal entry of plaintiff's demurrer overruled and petition dismissed with costs and notation of appeal by plaintiff and fixing of bond and order substituting Harold E. Ickes Secretary as defendant.

9. Memo. of deposit of costs on appeal.
10. Assignment of errors.
11. This designation of record.

C. H. MERILLAT,
Attorney for Plaintiff.

Service acknowledged this 25 day of July, 1933.

CHARLES FAHY,
Attorney for Defendant.

31 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 30, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 81355 at Law, wherein The United States of America, ex relatione, Alonzo Perry, a minor, by his legal guardian G. W. Busby, is Plaintiff and Ray Lyman Wilbur, Secretary of the Interior, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 15th day of August, 1933.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk,

By CHAS. B. COFLIN,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6051. U. S. ex rel. Alonzo Perry, a minor, by his legal guardian, G. W. Busby, appellant, vs. Harold L. Ickes, Secretary of the Interior. Court of Appeals, District of Columbia. Filed Aug. 16, 1933. Henry W. Hodges, Clerk.

NOV 13 1933

Henry W. Shreve
CLERK

IN THE
Court of Appeals of the District of Columbia

No. 6051.

UNITED STATES EX REL. ALONZO PERRY,
A MINOR, BY HIS LEGAL GUARDIAN,
G. W. BUSBY, APPELLANT,

vs.

HAROLD L. ICKES, SECRETARY OF THE
INTERIOR, APPELLEE.

BRIEF OF APPELLANT.

CHARLES H. MERRILLAT,
Attorney for Appellant.

IN THE
Court of Appeals of the District of Columbia

No. 6051.

UNITED STATES EX REL. ALONZO PERRY,
A MINOR, BY HIS LEGAL GUARDIAN,
G. W. BUSBY, APPELLANT,

vs.

HAROLD L. ICKES, SECRETARY OF THE
INTERIOR, APPELLEE.

BRIEF OF APPELLANT.

This case was heretofore before this Court on an appeal by the Secretary of the Interior from a judgment in mandamus (Appeal No. 5862) granted by the court below directing the Secretary to pay over to the guardian of the minor Perry, in accordance with an order of the County Court of Pontotoc County, Oklahoma, which had directed the guardian to employ counsel to collect some sixty thousand dollars of funds belonging to the minor which the Secretary admittedly was withholding from payment to the

Court of the District of Columbia for the reason that Indian Commissioner Rhoads was endeavoring to have Congress enact legislation restricting the funds which, at the time of the court's orders, were unrestricted and which Mr. Rhoads and the Secretary meanwhile were withholding from payment to the lawful guardian and possessor of the funds by arbitrary conduct and disregard of the statutes and the opinion of the departmental solicitor.

The cause having been remanded to the lower court, appellant went below, submitted as was its duty to the overruling by the court below of its prior action and to entry of a final judgment denying appellant relief. From this final judgment the present appeal is taken and the matter placed before this Court.

Argument.

Counsel submit to this Court that it, as the proper tribunal, should set aside its former opinion and for reasons therefor call the Court's attention specially to Assignments of Error 4, 5 and 6 in the record (p. 40).

It has been many times held by this Court and other courts that in a republican form of government there is no room for arbitrary action. The record here discloses that the only reason why the funds here in question were in the hands of the Secretary at the time of the passage of the act of January 27, 1933, was because he was arbitrarily withholding said funds from the lawful guardian entitled to them under the general law of guardians and the orders of the court in Oklahoma invested by law with jurisdiction in the premises (act of May 27, 1908, for

been invested, could that disposition be taken away? Suppose that funds had been and were in a bank drawing interest, can it possibly be held that the legislation in question would require that the funds be remitted by the bank to the Secretary for his control?

The duty of the guardian after April 26, 1931, was to obtain possession of his ward's property and manage it under the orders of the court. He had both this duty and authority and this authority was, as counsel will show, coupled with an interest.

The act of January 27, 1933, as construed by the court necessarily involves an encroachment in advance of the act by the appellee on the powers of the county court of Oklahoma which had been invested with the jurisdiction, and then involves after the act an encroachment by the legislative department of the government on the judicial branch of the government and on the interest of the guardian.

In *Muskrat vs. U. S.*, 219 U. S. 346, the Supreme Court had occasion to review the fundamentals of the constitutional division of powers of government and approved the following from *Hayburn's Case*, 2 Dallas 409: "By the Constitution of the United States the government thereof is divided into three distinct and independent branches, and it is the duty of each to abstain from, and to oppose, encroachments on either." It held that where a court has acted judicially its determination cannot be abrogated and nullified legislatively.

McNichol vs. U. S. Mercantile Rep. Agency, 74 Mo. 457-71, it is submitted, correctly states the rule which should be applied here in the following language:

the removal of restrictions in the Five Tribes providing that "the persons and property of minor allottees" shall "be subject to the jurisdiction of the probate courts of the State of Oklahoma," and continued in the act of May 10, 1928 [45 Stats. 495].)

There was no room for question that the funds were unrestricted and were subject to the jurisdiction as unrestricted funds of the guardian in the Oklahoma county court (*Harris vs. Bell*, 254 U. S. 103) because the statute had in plain terms provided that restrictions ended April 26, 1931, as to homesteads where inherited from an allottee who died "leaving issue surviving, born since March 4, 1906."

The action of the Secretary of the Interior, therefore, was plainly and palpably arbitrary and tortious and a defiance of law and of judicial authority. He was a law breaker just as much as a violator of the Volstead Act.

That being the case, the act of January 27, 1933, when it provided that all funds then or thereafter held under the supervision of the Secretary of the Interior were declared restricted until 1956 could not be held to operate retrospectively on funds to which the Secretary had no right of lawful possession.

Had the funds been in fact, as they were in legal contemplation, in the hands of the guardian and subject to the jurisdiction of the county court of Oklahoma, then plainly Congress could not constitutionally enact a law taking those funds away from the county court and placing the control of the funds in the hands of the Secretary of the Interior.

Congress in all its Indian legislation never has undertaken to do such a thing. Suppose, for example, the court had directed and the funds had

been invested, could that disposition be taken away? Suppose that funds had been and were in a bank drawing interest, can it possibly be held that the legislation in question would require that the funds be remitted by the bank to the Secretary for his control?

The duty of the guardian after April 26, 1931, was to obtain possession of his ward's property and manage it under the orders of the court. He had both this duty and authority and this authority was, as counsel will show, coupled with an interest.

The act of January 27, 1933, as construed by the court necessarily involves an encroachment in advance of the act by the appellee on the powers of the county court of Oklahoma which had been invested with the jurisdiction, and then involves after the act an encroachment by the legislative department of the government on the judicial branch of the government and on the interest of the guardian.

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McNichol vs. U. S. Mercantile Rep. Agency, 74 Mo. 457-71, it is submitted, correctly states the rule which should be applied here in the following language:

“Legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made. This would be to install the legislature in the place of the judiciary, with power to revise and overturn the solemn adjudications of the latter—a thing not to be tolerated. Such action, however, of the legislature, though retrospectively void, is held valid as to future cases.”

In *Lincoln vs. Alexander*, 52 Calif. 487, the legislature had undertaken to prevent certain property from being under the court guardian's control and to place it under that of a parent of the child. The court held:

• “The guardian of a minor's estate has an authority *coupled with an interest in the estate*—not a bare authority.

“Where a duly qualified and acting statutory guardian has charge of a minor's estate, the legislature cannot by special act empower another party to dispose of the estate. Such an act would be judicial in its nature, and therefore unconstitutional,” citing *Schouler on Domestic Relations*, page 471.

This interest was a vested interest in the guardian because his fees are based on the amount of money passing through his hands; the ward's interest was in receiving the income the funds when invested would produce and being released from court guardianship on reaching 21 years of age. The construction of the act by this court as operating retroactively on funds belonging lawfully in the guardian's

possession is in effect a repeal *pro tanto* and by implication of the statutes of Congress which had vested jurisdiction of the minor's estate in the county courts of Oklahoma, Section 6, Act of May 27, 1908. Construed, as laws generally are to be construed, as operating prospectively, no destruction of the guardian's interest occurs because after January 27, 1933, as to funds thereafter lawfully in the Secretary's hands, neither the court nor the guardian would have any duty as to them.

7 That an interest which had once become vested in the guardian cannot constitutionally be divested by the executive or Congress, see *West vs. Lyders*, 36 Fed. (2d) 108, and *U. S. vs. Waller*, 243 U. S. 452.

The foregoing accords with the usual rule of law that the difference between legislation and judicial decision is that the judiciary decides what the law is and the legislature what it shall be, and also would conform to the legal maxim that the law regards **as** done what the law holds should have been done. **Had** the Secretary, as was his unquestioned lawful **duty**, turned over the funds to the court guardian instead of defying the court until he could obtain legislation, the funds would have been out of his hands when **the** legislation was passed and the act of Congress **ob-**viously would not apply to them. The law should not be construed to sanction a wrong and offend our principles of government.

It is respectfully submitted the judgment below should be reversed on the ground that as applied to the instant case it violates the Constitution in impairing the guardian's interest and violates the fundamental principle of our government that the legis-

In *Choate vs. Trapp*, 224 U. S. 665, the Court said it had upheld the **right** of Congress to extend disabilities of Indians and then "But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which have been vested in the individual Indian by prior laws or contracts. Such rights are protected

lative power cannot encroach upon or infringe upon the judiciary—*Dash vs. Van Kleeck*, 7 Johns. 477-98; *Ogden vs. Blackledge*, 2 Cranch 272; *Greenough*, 11 Pa. St. 489. *Cooley's Constitutional Limitations*, 8th ed., p. 190, holds that legislative action cannot retroact and cause reversal of action which the courts have directed in exercise of undoubted authority and that such legislation must apply wholly to the future. See also *U. S. vs. Klein*, 13 Wall. 128, and *McCullough vs. Virginia*, 172 U. S. 102.

Before closing, counsel may state that the opinion of the court in the instant controversy is being construed to authorize the Department to destroy vested contract rights. That this is no idle statement is shown by the following:

One Betsy Harjo, in June, 1931, employed by written contract Frank L. Warren, an attorney, to represent her as heir and next of kin of her son who was born after March 4, 1906, and inherited from the allottee a homestead and the oil royalties accruing therefrom in Hughes County, Oklahoma. Restrictions ran out April 26, 1931. The contract was approved by the court and a lien thereunder established by strict compliance with the Oklahoma statutes. See *Houston vs. Ormes*, 252 U. S. 469. The claim against the mother was by a woman who claimed as common law wife and having a child by the mother's boy to be entitled to the homestead and funds derived therefrom. The attorney successfully completed his contract in September, 1932, to defeat the common law wife claim.

The funds were in the hands of the Secretary of the Interior and he has refused payment to the at-

torney, notwithstanding Betsy Harjo has requested payment, on the ground that the act of January 27, 1933, passed after the contract was executed and after the services were performed, permits the Secretary of the Interior to fix the value of the services or refuse payment and to ignore the valid contract.

Respectfully submitted,

CHARLES H. MERILLAT,
Attorney for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

DEC 4 - 1933

No. 605

Harry W. Bridges

CLERK

**In the Court of Appeals of the District of
Columbia**

APRIL TERM, 1933

THE UNITED STATES OF AMERICA EX REL. ALONZO
PERRY, A MINOR, BY HIS LEGAL GUARDIAN, G. W.
BUSBY, APPELLANT

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
APPELLEE

BRIEF OF APPELLEE, INCLUDING POINTS AND
AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,

CHARLES FAHY,

First Assistant Solicitor, Department of the Interior,

J. KENNARD CHEADLE,

Assistant Solicitor, Department of the Interior,

Attorneys for Appellee.

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**In the Court of Appeals of the District of
Columbia**

APRIL TERM, 1933

No. 6051

THE UNITED STATES OF AMERICA EX REL. ALONZO
Perry, a Minor, by His Legal Guardian, G. W.
Busby, appellant

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
appellee

**POINTS AND AUTHORITIES IN SUPPORT OF APPELLEE'S
MOTION TO DISMISS**

This case was heretofore before this court on appeal (Appeal No. 5862) from a judgment in mandamus (R. pgs. 37, 38) granted by the court below, ordering that a writ of mandamus be directed to the Secretary of the Interior, commanding him to turn over to G. W. Busby, legal guardian of Alonzo Perry, minor, all the moneys, funds and property belonging to Alonzo Perry, minor, then held or claimed to be held by the Secretary of the Interior. This court reversed the judgment. (*Ickes v. United States ex rel. Perry*, decided April 3, 1933, 64 Fed. (2d) 982), holding that the moneys, funds and property involved had lawfully come into the hands of the

Secretary of the Interior and were being lawfully held by him until the question of whether they were restricted or unrestricted was determined by the courts or by Congress, and that, Congress by enactment of January 27, 1933, having declared such funds to be restricted, G. W. Busby, as legal guardian of Alonzo Perry, was not entitled to such restricted funds.

In strict conformance with the opinion and mandate of this court, upon the basis of such opinion and mandate alone and without any amendment in the pleadings, the court below entered judgment (R. pg. 38) dismissing the petition for a writ of mandamus. From this judgment of the court below, entered in strict conformance with the opinion and mandate of this court, the appellant has appealed to this court, with the following assignment of errors:

The plaintiff alleges that errors were committed herein by the Supreme Court of the District of Columbia and the Court of Appeals in the following particulars:

1. In directing to be overruled and in overruling plaintiff's demurrer to defendant's answer.

2. In directing and in entering final judgment against plaintiff with costs.

3. In not holding that moneys due plaintiff accumulated in the hands of the Secretary of the Interior as restricted funds had become unrestricted on April 26, 1931, by the death of the allottee and were payable to plaintiff under the order of the county court of Pontotoc county, Oklahoma, and that the Secre-

tary of the Interior was unlawfully withholding possession of said funds from plaintiff.

4. In not holding that the Secretary of the Interior having no rightful possession of the funds of Alonzo Perry when the act of January 27, 1933, was passed the fact that by wrongful usurpation he was in physical possession of said funds on January 27, 1933, did not bring said funds within his control under said act of January 27, 1933.

5. In not holding that the act of January 27, 1933, would be unconstitutional if applied retroactively so as to oust the control of the funds in controversy from the county court which in pursuance of a lawful jurisdiction vested in it had passed judicial orders and judgment with reference to said funds prior to the act of January 27, 1933.

6. In not construing the act of January 27, 1933, prospectively so as to avoid constitutional doubts arising by construing the act as having retroactive operation and thereby permitting Executive interference with the lawful jurisdiction of the proper courts of the State of Oklahoma over the funds at the time the act was passed. (R. pgs. 39 and 40.)

Where a judgment of a lower court is entered upon a mandate of this court, and upon no other basis, upon subsequent appeal this court will examine that judgment only to determine whether it is in conformance with the mandate.

In *Warner v. Grayson* (24 App.D.C. 55, 57) this court declared that—

the former decision has become the settled law of the case, not only for the trial court, but for this court also.

In *Holcomb v. Dearing* (8 App.D.C. 298, 301), relied upon for authority in the *Grayson* case, *supra*, this court stated:

The case was not restored to the trial calendar until after the creation and organization of this court. There was no amendment of the pleadings, and the case was tried as before. The trial justice, in obedience to the judgment of the General Term, instructed the jury to return a verdict for nominal damages. Nothing else remained for him to do. He had no discretion in the matter, and was bound by the judgment of the appellate court, no matter what his own opinion may have been. The General Term itself, had its jurisdiction not been taken away, would have been concluded by its own judgment on a second appeal. It must have regarded the question as finally settled. *Supervisors v. Kennicott*, 94 U.S. 498; *Clark v. Keith*, 106 U.S. 464; *Texas and Pacific Railway Company v. Anderson*, 149 U.S. 237; *In re Sanford Fork and Tool Co.*, 160 U.S. 247, 255, 259.

The court having succeeded to the appellate jurisdiction of the Supreme Court of the District, is bound by the same rule. We do not inquire into the grounds of its judgment at all. We simply look into the record to see if the question raised on the second appeal was

considered and decided by that court. If it was we cannot undertake its re-examination.

The *Grayson* case, *supra*, holding on the force of the "law of the case" rule, has been followed by this court in *District of Columbia v. Brewer* (32 App.D.C. 388) and *Walker v. Gish* (51 App.D.C. 4, 273 Fed. 366).

The assignment of errors, *supra*, shows: That appellant does not deny that the judgment appealed from was entered in strict conformance with the mandate and opinion of this court, and that the only errors appellant assigns are errors alleged to have been committed by this court in reaching its judgment upon the first appeal. The lower court had no discretion in entering the judgment appealed from, but was bound to follow the mandate of this court. *Holcomb v. Dearing* (8 App.D.C. 298); *Warner v. Grayson* (24 App.D.C. 55); *District of Columbia v. Brewer* (32 App.D.C. 388).

The assignment of errors, therefore, must be taken to be directed solely against the judgment of this court.

An appeal taken from a judgment of a lower court which, it is not denied, has been entered in strict conformance with a mandate of this court, upon the basis of such mandate alone and without amendment of pleadings, may be dismissed upon a motion to dismiss filed by the appellee.

This court in *Mackall v. Willoughby* (6 App.D.C. 125, et seq.) refused to entertain an appeal on the grounds: That its decision in the same case on a

former appeal had established the law of the case, that appellant did not deny that the decree, from which he was appealing the case for the second time, was entered in strict conformity to the opinion and mandate of this court; and that, therefore, if this court entertained the subsequent appeal it would be, in effect, an appeal from its own decision, an incongruity that could not be allowed. Upon motion by appellee the appeal was dismissed, notwithstanding the appellant's desire to have a judgment of affirmance entered so that he could take the case to the Supreme Court of the United States. In the course of its opinion on this aspect of the case the court stated:

The appellee has moved to dismiss the appeal, upon the ground that the present appeal presents no new question for decision, and that the litigation is concluded so far as this court is concerned.

It is not denied, indeed it is conceded by the counsel for the appellant, that the decree from which this appeal is taken was made in strict conformity to the opinion and mandate of this court. And such being the case, the question is, ought the present appeal to be entertained by this court? We do not understand that the case is brought here with any view of attempting to procure from this court a review and reversal of its former opinion and decree. But we are informed by counsel for the appellant that it is deemed material or important that a judgment of affirmance should be entered on this appeal to enable the appellant

to take the case to the Supreme Court of the United States. And while this court is entirely willing to afford any facility in its power to enable parties to exercise the right of appeal to the fullest extent, the present mode of procedure is not deemed proper to that end; and in the opinion of this court the appellee is entitled to have this appeal dismissed.

It is a well settled principle in the practice of appellate procedure, that an appeal will not be entertained from a decree entered in the court below in exact conformity to the mandate of the appellate court issued in the same case upon a previous appeal. There must be an end for appeals as for all other proceedings; and while it is true, that if, in the course of the execution of the decree, after its entry, either party is aggrieved by what may have been done in such execution, he may appeal from the final decree in that behalf; such an appeal will bring up for review only the proceedings subsequent to the mandate. *Stewart v. Salamon*, 97 U.S. 361. Where such an appeal is taken from a decree passed in pursuance of the mandate of an appellate court, the latter will, upon motion of the appellee to dismiss, simply examine the decree entered by the court below, and if that decree conforms to the mandate sent down, dismiss the appeal with costs.

* * * * *

Looking to the right of the appellant to appeal to the Supreme Court, the decree of this court upon which the mandate to the lower court was founded, was a final decree

for all purposes of an appeal to the Supreme Court of the United States; and that is all that would seem to be necessary for the protection of the rights of the appellant. *Mower v. Fletcher*, 114 U.S. 127. It is not so much to a matter of form as it is to a matter of substance that the Supreme Court looks in determining whether a decree be final or not; and if it be in substance a final determination of the litigation so as to conclude the parties, it is, according to the decided cases, appealable. The appeal must be dismissed, with costs to the appellee.

It is accordingly submitted that the judgment of this court in this case when it was first appealed, upon which judgment the mandate of the lower court was founded, was a final judgment for all purposes of an appeal to the Supreme Court of the United States; that the judgment appealed from was entered, as is unquestioned, in strict conformance with the opinion and mandate of this court, upon the basis of that mandate alone and without amendment of pleadings; and that, therefore, upon the authority of the decided cases of this court set forth above the appellee's motion to dismiss the appeal should be granted.

BRIEF OF APPELLEE

HISTORY OF THE CASE

This case was before this court heretofore, on an appeal (Appeal No. 5862) "by the Secretary of the Interior from a judgment of the Supreme Court of the District of Columbia in favor of the plaintiff below, directing the Secretary to turn over all the moneys,

funds, and property belonging to plaintiff now in his possession.

“It appears that plaintiff is a son of Alice Perry, a half-blood member of the Chickasaw Indians, one of the Five Civilized Tribes of Oklahoma. She was duly enrolled and allotted land on which an oil lease was placed. Alice Perry died on June 22, 1923. At the date of her death there had accrued, in the hands of the Secretary of the Interior, approximately \$60,000 from oil and gas royalties which descended to plaintiff.” (*Ickes v. United States ex rel. Perry*, 64 Fed. (2d) 982.)

Plaintiff petitioned for mandamus in the Supreme Court of the District of Columbia (R. pgs. 2 to 21); an order to show cause was issued by the court (R. pg. 22); defendant made return to the rule and an answer to the petition (R. pgs. 22 to 25); plaintiff demurred to the answer (R. pgs. 25, 26), and the court sustained the demurrer (R. pg. 37). Defendant did not amend his pleading and the court entered judgment in favor of the plaintiff (R. pgs. 37, 38). On appeal to this court the judgment of the lower court was reversed (*Ickes v. United States ex rel. Perry*, decided April 3, 1933; reported in 64 Fed. (2d) 982). Obeying the mandate of this court, the lower court vacated its judgment, and the plaintiff electing to stand upon his demurrer, that court overruled the demurrer, dismissed the petition and discharged the rule issued thereon. (R. pg. 38.) From this final judgment of the lower court the plaintiff has taken an

appeal (R. pg. 38) and has placed the case again before this court upon the following assignments of error:

The plaintiff alleges that errors were committed herein by the Supreme Court of the District of Columbia and the Court of Appeals in the following particulars:

1. In directing to be overruled and in overruling plaintiff's demurrer to defendant's answer.

2. In directing and in entering final judgment against plaintiff with costs.

3. In not holding that moneys due plaintiff accumulated in the hands of the Secretary of the Interior as restricted funds had become unrestricted on April 26, 1931, by the death of the allottee and were payable to plaintiff under the order of the county court of Pontotoc county, Oklahoma, and that the Secretary of the Interior was unlawfully withholding possession of said funds from plaintiff.

4. In not holding that the Secretary of the Interior having no rightful possession of the funds of Alonzo Perry when the act of January 27, 1933, was passed the fact that by wrongful usurpation he was in physical possession of said funds on January 27, 1933, did not bring said funds within his control under said act January 27, 1933.

5. In not holding that the act of January 27, 1933, would be unconstitutional if applied retroactively so as to oust the control of the funds in controversy from the county court which in pursuance of a lawful jurisdiction vested in it had passed judicial orders and

judgment with reference to said funds prior to the act of January 27, 1933.

6. In not construing the act of January 27, 1933, prospectively so as to avoid constitutional doubts arising by construing the act as having retroactive operation and thereby permitting Executive interference with the lawful jurisdiction of the proper courts of the State of Oklahoma over the funds at the time the act was passed. (R. pg. 39, 40.)

ARGUMENT

I

Rule of the law of the case

It is an established rule of this court and other courts that whatever has been decided on one appeal cannot be reexamined on a second appeal brought in the same suit, because the first decision has become the settled law of the case.

This appeal being a subsequent appeal of the same case to the same court, this court's decision on the first appeal should now be taken to be the law of the case, and, the final judgment of the court below being rendered in conformance with the opinion and mandate of this court upon the first appeal, that final judgment, upon this appeal, should be affirmed.

This court has definitely established and regularly followed the rule that its decision upon an appeal becomes the settled law of the case, not only for the lower court, but for this court as well.

In *Warner v. Grayson* (24 App.D.C. 55, 57) this court stated that there were before the court "sepa-

U.S. 464; *Texas and Pacific Railway Company v. Anderson*, 149 U.S. 237; *In re Sanford Fork and Tool Co.*, 160 U.S. 247, 255, 259.

The court having succeeded to the appellate jurisdiction of the Supreme Court of the District, is bound by the same rule. We do not inquire into the grounds of its judgment at all. We simply look into the record to see if the question raised on the second appeal was considered and decided by that court. If it was we cannot undertake its re-examination.

Warner v. Grayson, *supra*, was relied upon by this court in *Walker v. Gish* (51 App. D.C. 4, 5, 273 Fed. 366). The bill of exceptions in that case recited:

The court charged the jury in accordance with the opinion of the Court of Appeals in the case of *Genevieve K. Gish v. Ernest G. Walker*, 48 App. D.C. 42, namely, that the jury should determine whether there had been a use of the party wall by the defendant, and, if they determined that issue in the affirmative, that they should then ascertain the reasonable value of such part of the party wall as was used; that, if they found that the party wall was not used, their verdict should be for the defendant.

And this court again held that a ruling on a former appeal is the law of the case for both trial and appellate courts, stating in its opinion:

The former decision has become the settled law of the case, "not only for the trial court,

but for this court also." *Warner v. Grayson*, 24 App. D.C. 55, 57; *Thompson v. Maxwell Land-Grant Co.*, 168 U.S. 451, 18 Sup. Ct. 121, 42 L. Ed. 539.

In *District of Columbia v. Brewer* (32 App. D.C. 388, 390), this court again followed *Warner v. Grayson*, *supra*. As stated by Mr. Justice Robb in his opinion for the court, "The sole question presented is whether the former adjudication of this case by this court constituted the law of the case notwithstanding the above decision of the Supreme Court in the *Mosheuvel Case*." The court then recognized the well-established rule of the law of the case:

It is not necessary to discuss the general rule that a prior decision is conclusive on the same question on a subsequent appeal, for no rule is more firmly established or rigidly adhered to; *Warner v. Grayson*, 24 App. D.C. 57; *Roberts v. Cooper*, 20 How. 481, 15 L. ed. 973; *Re Sanford Fork & Tool Co.* 160 U.S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; *Yazoo & M. Valley R. Co. v. Adams*, 180 U.S. 6, 45 L. ed. 401; *Illinois v. Illinois C. R. Co.*, 184 U.S. 91, 46 L. ed. 446, 22 Sup. Ct. Rep. 300; *United States v. Camou*, 184 U.S. 574, 46 L. ed. 695, 22 Sup. Ct. Rep. 505.

District of Columbia v. Brewer, *supra*, was cited by this court with approval in *Smith v. Law* (56 App. D.C. 86, 87, 10 Fed. (2d) 651), in which it was held that a first action was "conclusive upon all matters

directly involved therein, or such as could have been then adjudicated."

The great weight of authority supports the rule as enunciated and followed by this court.

The widely followed case of *Stewart v. Salamon* (97 U.S. 361, 24 L. Ed. 1044) was quoted from and relied upon in *United States v. New York Indians* (173 U.S. 464, 472, 19 Sup. Ct. 487; 43 L. Ed. 769), in which the court said:

This court has repeatedly held that a second writ of error does not bring up the whole record for reexamination, but only the proceedings subsequent to the mandate, and if those proceedings are merely such as the mandate command, and are necessary to its execution, the writ of error will be dismissed, as any other rule would enable the losing party to delay the issuing of the mandate indefinitely. *The Santa Maria*, 10 Wheat. 431; *Roberts v. Cooper*, 20 How. 467; *Tyler v. Magwire*, 17 Wall. 253; *The Lady Pike*, 96 U.S. 461; *Supervisors v. Kennicott*, 94 U.S. 498; *Stewart v. Salamon*, 97 U.S. 361.

In *Stewart v. Salamon*, *supra*, Mr. Chief Justice Waite observed: "An appeal will not be entertained by this court from a decree entered in the Circuit or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will, upon the application of the appellee, examine the decree entered, and if it conforms to the mandate,

dismiss the case with costs. If it does not, the case will be remanded with proper directions for the correction of the error. The same rule applies to writs of error." *Humphrey v. Baker*, 103 U.S. 736; *Clark v. Keith*, 106 U.S. 464; *Mackall v. Richards*, 116 U.S. 45.

The appeal will therefore be *Dismissed*.

To the same effect are: *Aspen Mining and Smelting Co. v. Billings* (150 U.S. 31, 37, 14 Sup. Ct. 4, 37 L. Ed. 986); *Texas & Pacific Ry. v. Anderson* (149 U.S. 237, 242, 13 Sup. Ct. 843, 37 L. Ed. 717).

In *Thompson v. Maxwell Land Grant Co.* (168 U.S. 451, 456, 18 Sup. Ct. 121, 42 L. Ed. 539), Mr. Justice Brewer, in his opinion for the court stated:

It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be reexamined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case. *Supervisors v. Kennicott*, 94 U.S. 498, and cases cited in the opinion; *Clark v. Keith*, 106 U.S. 464; *Chaffin v. Taylor*, 116 U.S. 567; *Northern Pacific Railroad v. Ellis*, 144 U.S. 458; *Great Western Telegraph Company v. Burnham*, 162 U.S. 339, 343.

The rule is widely recognized and applied in the United States Circuit Courts of Appeal.

In *Mutual Reserve Fund Life Association v. Ferrenbach* (144 Fed. 342, 343, C.C.A. 8th Circuit), the court said:

This is the second appearance of this case in this court. When it was first tried in the Circuit Court, a verdict was directed in favor of

directly involved therein, or such as could have been then adjudicated.”

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dismiss the case with costs. If it does not, the case will be remanded with proper directions for the correction of the error. The same rule applies to writs of error." *Humphrey v. Baker*, 103 U.S. 736; *Clark v. Keith*, 106 U.S. 464; *Mackall v. Richards*, 116 U.S. 45.

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This is the second appearance of this case in this court. When it was first tried in the Circuit Court, a verdict was directed in favor of

the association upon the ground that the policy of insurance had been lawfully declared to be forfeited for the failure of the insured to pay a premium when due, and judgment was rendered accordingly. The judgment was reversed and it was held that the position of the association was untenable.

* * * * *

The law of this case, so far as it concerns the right of the association to forfeit the policy, was announced by this court upon the return of the first writ of error, and we will not re-examine the question when the cause again comes before us upon the same facts and under the same conditions.

Lesamis v. Greenberg (250 Fed. 848, C.C.A. 9th Circuit); *Chapin-Sacks Mfg. Co. v. Hendler Creamery Co.* (267 Fed. 180, C.C.A. 4th Circuit); *Finley v. United Mine Workers* (300 Fed. 972, C.C.A. 8th Circuit); *Freeman v. Smith* (62 Fed. (2d) 291, C.C.A. 9th Circuit) are in accord.

In *Town of Fletcher v. Hickman* (208 Fed. 118, 121, C.C.A. 8th), Judge Sanborn, in his opinion for the court stated:

A legal proposition once considered and decided in a given cause by an appellate court may not be again questioned in that court on a subsequent writ or appeal to review a subsequent trial of the same case on the same issues and evidence. Such propositions are *res adjudicata* between the parties to that suit and their privies and constitute the law of the case. * * *

The court below was of this opinion, and its judgment must be affirmed. It is so ordered.

The same ruling was made by the Circuit Court of Appeals of the Sixth Circuit in *Anderson v. Messenger* (158 Fed. 250, 252):

We have been invited by counsel for defendant to reconsider the question of the construction of Henry Anderson's will. We must decline to do this. The questions there decided are matters adjudged and have become the law of the case. When the former writ of error was disposed of the questions of law in the case were settled, and we have now no authority to redetermine them. This is the established doctrine which governs the federal courts and is quite generally accepted in other courts. This court has recognized and applied the rule in previous cases.

In accord: *Westling v. United States* (60 Fed. (2d) 398; *Aetna Life Insurance Co. v. Wharton* (63 Fed. (2d) 378).

Ash Sheep Co. v. United States (250 Fed. 591, 592, C.C.A. 9th Circuit) is a case very much in point here. There the lower court entered a decree in conformance with the judgment of the appellate court and from that decree appeal was brought. The appeal was brought principally for the purpose of carrying the case to the United States Supreme Court; and in affirming the decree the court stated:

It is admitted that the appeal in this case is taken principally for the purpose of keeping alive the right of the appellant to present by

appeal to the Supreme Court of the United States the question whether the lands so surrendered by the Crow Indians to the United States are public lands, or are lands held in trust by the United States for the Indians, and subject to the control of the Bureau of Indian Affairs. No additional ground now is suggested for holding otherwise than as we held before, and our prior judgment must be accepted as the law of the case on this appeal. *Roberts v. Cooper*, 20 How. 467, 481, 15 L. Ed. 969; *Oregon R. R. & Nav. Co. v. Balfour*, 90 Fed. 295, 33 C.C.A. 57; *Standard Sewing Mach. Co. v. Lesile*, 118 Fed. 557, 55 C.C.A. 323.

The decree is affirmed.

II

Exception to the rule of the law of the case should not be made here

The rule of the law of the case does admit of a few exceptions. While the rule is not, therefore, inexorable, it is nevertheless true that unusual circumstances, at least a showing that the appellate court's first judgment in the suit was clearly erroneous and unjust, are required to except the case from application of the rule.

In *Wolf Bros. & Co. v. Hamilton-Brown Shoe Co.* (206 Fed. 611, 615, C.C.A. 8th Circuit) the Court indicated the narrowness of the exception.

The adjudication made (upon the first appeal) was upon the merits, and should be reopened, if at all, only upon convincing evidence that the original conclusion, which led

to the injunction and to this accounting, was wrong.

To the same effect is *Chesapeake & Ohio Ry. Co. v. McKell* (209 Fed. 514, 516):

We find no occasion to doubt the abstract power of an appellate court, upon a second review, to reach a result inconsistent with its decision on the first review of the same case (*Messinger v. Anderson*, 225 U.S. 436, 444, 32 Sup. Ct. 739, 56 L. Ed. 1152); but this is a power to be exercised very sparingly, and only under extraordinary conditions. The practice that such a decision be treated as the law of the case, to be followed by the appellate court itself as well as by the trial court, is most salutary, and its violation (save in rare exceptions) would intolerably unsettle all litigation.

Johnson v. Cadillac Motor Car Co. (261 Fed. 878, 886, C.C.A. 2d Circuit) is a leading case making an exception to the rule. In that case recovery depended upon proving an automobile manufacturer to have been negligent in inspecting and testing the wheels of an automobile manufactured by him. The Circuit Court of Appeals, upon the first appeal, held that the manufacturer owed no duty of care to the plaintiff who was a sub-vendee of the automobile. After that decision and before the second appeal the famous case of *MacPherson v. Buick Motor Co.* (217 N.Y. 382, 111 N.E. 1050) was decided contrariwise. Upon the second appeal in the *Johnson* case, the appellate court made an exception to the rule of the law of the case, followed the Mac-

Pherson decision, and reversed its judgment rendered on the first appeal. One judge dissented on the ground that the rule of the law of the case had made the legal question *res adjudicata* in the particular case before the court. The opinion of the majority stated:

We recognize the full force and effect of the doctrine of stare decisis, and the general rule that on a second appeal matters disposed of on the first appeal ordinarily will not be again considered. It is, like the rule of *res adjudicata*, not a mere rule of practice inherited from a more technical time than ours. It is a rule "of public policy and of private peace," and is to be cordially regarded and followed in all proper cases. *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 298, 37 Sup. Ct. 506, 61 L. Ed. 1148. But the rule is not an inexorable one, and should not be adhered to in a case in which the court has committed an error which results in injustice, and at the same time lays down a principle of law for future guidance which is unsound and contrary to the interests of society. We are satisfied that the present case falls under the exception to which we have referred.

In *Ford Motor Co. v. Hotel Woodward Co.* (271 Fed. 625, 627) the same Circuit Court of Appeals, while recognizing the exception, limited it to the narrow confines of "extraordinary circumstances."

We have held in *Johnson v. Cadillac Co.*, 261 Fed. 878, 8 A.L.R. 1023, that we are not absolutely bound by the conclusions of the court

upon a former appeal; but we should depart from the rule only under extraordinary circumstances, and we are not at all disposed to do so in this case.

Lackner v. McKechney (2 Fed. (2d) 516, C.C.A. 7th Circuit) is in accord.

It is pertinent here to refer to *District of Columbia v. Brewer* (32 App. D.C. 388, 389, 391). The facts of that case as stated by the court in its opinion were:

This case in all its essential details was here fourteen years ago (*District of Columbia v. Brewer*, 7 App.D.C. 113), and it was then held that the plaintiff, Harrison G. Brewer, appellee here, had no right of action because of his contributory negligence. In 1903 the Supreme Court of the United States in deciding another case from this court (*Mosheuel v. District of Columbia*, 191 U.S. 247, 48 L. ed. 170, 24 Sup. Ct. Rep. 57; S.C. 17 App.D.C. 401), to which the rule announced in this case had been applied, discussed the decision of this court in this case and found the reasoning and conclusion therein erroneous. Thereafter a new trial was had in this case, it having been permitted in the meanwhile to lie dormant in the court below, which resulted in a verdict and judgment for the plaintiff. The defendant appealed.

The court recognized the general rule of the law of the case (see page 15, *supra*, of this brief) and refused to depart from it in the case then before the court, notwithstanding the doctrine of the court upon which the first appeal was decided had, since the first appeal,

been repudiated by the Supreme Court of the United States.

A departure from the general rule is sought in this case, because it is contended, the decision in the *Mosheuvél Case* is in effect a reversal of our decision in this case, and, therefore, controlling here. If plaintiff's postulate is correct, his conclusion logically follows. We think, however, his postulate involves a misapprehension of the *Mosheuvél* decision. That decision was not rendered in this case, and the court considered our former opinion herein solely for the purpose of the case before it. The court repudiated the *doctrine* announced by us in this case, but left the decision exactly where it was, and while the rule announced by the Supreme Court in that case will control and govern future cases in this court, it affects this case no more than it does any other case previously disposed of by us.

The position taken by this court in the *Brewer* case indicates that it considers the exceptions to the rule to be so confined as to exclude the exception made by the Second Circuit Court of Appeals in the *Johnson* case, *supra*.

Grounds for exception to the rule seem to exist where between two appeals to a Federal appellate court the United States Supreme Court has given a statute a construction that destroys the basis for the decision on the first appeal. An exception was recognized in such a situation by the Circuit Court of Appeals of the Second Circuit in *Higgins v. Cali-*

*for*nia Prune and Apricot Growers (3 Fed. (2nd) 896). There the predicate of the Circuit Court of Appeals' first decision was destroyed by subsequent construction of the Federal Judicial Code by the Supreme Court of the United States. Upon the second appeal, the Circuit Court of Appeals refused to apply the rule of the law of the case.

In *Turner v. Kirkwood* (62 Fed. (2nd) 256, 259, C.C.A. 10th Circuit) the court applied the rule of the law of the case in affirming judgment upon a second appeal of the same case. The court recognized that exceptions do exist, but, too, that they are limited to exceptional circumstances. It expressly recognized only one exception:

We agree that if, between two appeals, a pertinent decision is handed down by the Supreme Court of the United States or by a controlling State court, the first decision need not be followed. (*Utah Power and Light Company v. United States*, C.C.A., 8; 242 F. 924.) No such exceptional circumstance is present here.

In *Maryland Casualty Company v. City of South Norfolk* (54 Fed. (2d) 1032, 1039, C.C.A., 4th Circuit) the court held that a contention that the former decision of the court was erroneous and should be reversed is a question to be raised by a petition for rehearing and not by a subsequent appeal. The court gave only a narrow scope to the exceptions to the rule of the law of the case:

The other contention is that the former decision of this court holding that the bond covered

the claims of materialmen was erroneous and should be reversed. This, however, is a question which must be raised by petition for rehearing and not by subsequent appeal. *Thompson v. Maxwell Land-Grant Co.*, 168 U.S. 451, 18 S. Ct. 121, 42 L. Ed. 539. The former decision of this court became the law of the case; and, while we have the power on a subsequent appeal to reverse it, we exercise the power only in the most unusual circumstances, as where the Supreme Court of the United States has decided the same matter differently during the interim, or where, in a case involving the interpretation of a state statute or rule of property, the Supreme Court of a state has rendered a decision in direct conflict with our former decision. It is not improper to say, however, that in this case we have no doubt as to the correctness of the former decision.

Recognizing the existing exceptions, the case now before the court cannot be brought within the category of those exceptions. There has been no construction of pertinent statute by the Supreme Court of the United States which would cause this court to reach a different decision than that upon which the judgment appealed from is based. The only contention that can be made for an exception here is the contention that this court committed error in rendering its judgment upon the first appeal. Such a contention, as pointed out by the Fourth Circuit Court of Appeals in the *Maryland Casualty Company case*, *supra*, and in other cases set forth above, is one to be

presented by a petition for rehearing, not by a subsequent appeal.

III

This court's prior judgment cannot be shown to be clearly erroneous

Even though this court might be willing to include among the exceptions to the rule of the law of the case appeals where its prior judgments are clearly erroneous, this case would still be one for application of the rule. Appellant cannot show that the prior decision of this case by this court was clearly erroneous, nor that it was erroneous.

Upon the first appeal this court considered the pertinent statute law:

Act of May 27, 1908 (35 Stat. 312).

Act of May 10, 1928 (45 Stat. 495-733).

Section 441, Revised Statutes of the United States.

Section 463, Revised Statutes of the United States.

Act of January 27, 1933 (Pub. No. 322, 72nd Congress).

The Court considered the case law supporting the appellant's contentions:

I. The royalties derived from an oil and gas lease on the restricted homestead, accumulated in the hands of the Secretary of the Interior as a restricted fund. The expiration of restrictions on the land did not include the money. Congress has not legislated relative to the money in clear, express language.

II. The trial court erred in entering judgment for the appellee, and in adjudging that

the writ of mandamus issue directed to the Secretary of the Interior.

Alaska Pacific Fisheries v. United States, 248 U.S. 78.

Choate v. Trapp, 224 U.S. 665.

Edward's Lessee v. Darby, 12 Wheat. 206.

King Appeal, No. 5612 (C. of A.).

La Roque v. United States, 239 U.S. 62.

Louisiana v. McAdoo, 234 U.S. 627, 633.

Morrison v. Fall, 52 App. D.C. 331, 334.

Parker v. Richard, 250 U.S. 235.

Parker v. Riley, 250 U.S. 66.

Payne v. U.S. ex rel. Olson, 50 App. D.C. 119, 122.

Red Bird v. United States, 203 U.S. 76.

Reed v. Reed, 52 App. D.C. 35, 37.

Sunderland v. United States, 266 U.S. 226.

Super v. Work, 55 App. D.C. 149, 150.

United States ex rel. Stowell v. Deming, 57 App. D.C. 223, 225.

United States v. Celestine, 215 U.S. 278.

United States v. Hinkle, 261 Fed. 518.

United States v. Nice, 241 U.S. 591.

United States v. Philbrick, 120 U.S. 52.

United States Shipping Board v. Hirsch Lbr. Co., 59 App. D.C. 116.

Wilbur v. Minidoka Irr. Dist., 50 Fed. (2d), 495 (C. of A.).

(Reference is made to the brief of appellant upon the first appeal, Appeal No. 5862, *Wilbur v. United States of America ex rel. Perry*.)

The court also considered the opposing contentions of the appellee, which contentions are, in substance,

repeated in appellant's brief filed in the appeal now before the court.

After such comprehensive consideration this court decided that the appellee was not entitled to a writ of mandamus since the moneys, funds and property in question had lawfully come into the hands of the Secretary of the Interior, were lawfully held by him until the question of whether they were restricted was settled, and that the Act of Congress of January 27, 1933 (Public No. 322, 72nd Congress), had settled the question. The case was declared, by this court, to be clearly within its holding in *Nancy King et al. v. Ickes* (decided the same day and reported in 64 Fed. (2d) 979, 982). In the King case this court held that funds, such as those involved here, were never within the jurisdiction of the Oklahoma court, that they came into the possession of the Secretary of the Interior in the lawful course of his supervisory power over the lands, from which the funds derived, and were in his possession at the time the Act of Congress was passed. This court stated, "we find no difficulty in applying the act here in question to the disposition of the funds in the possession of the Secretary."

Since the first appeal in this case was decided, in conformance with the existing law and consonant with the long existing Congressional policy regarding the Indians, there are no pertinent factors in addition to those then considered by this court to alter its decision then made.

CONCLUSION

From the foregoing it is manifest:

That this being an appeal from a final judgment entered in strict conformance with the mandate and opinion of this court, and entered without other basis and without amendment of the pleadings, it is an appeal to which should be applied the rule of the law of the case, the court thereby refusing to re-examine the issues it has once decided and affirming the judgment appealed from;

That there is no basis for making an exception to the rule of the law of the case in the disposition of this appeal, since there are no unusual circumstances which warrant a reexamination of the issues once decided by this court and since the appellant cannot show this court's prior decision to have been clearly erroneous.

In view of the foregoing, the judgment appealed from should be affirmed.

Respectfully submitted.

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